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No. __-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

TODD PACIFIC SHIPYARDS CORPORATION

and

AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

MARGARET L. JOHNSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 15, 1991

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QUESTIONS PRESENTED

1. Whether, despite unambiguous language of the Longshore and Harbor Workers' Compensation Act ("Longshore Act") specifically defining "the time of injury", for purposes of calculating average weekly wage with respect to occupational disease claims [33 U.S.C. Section 910(i)], the Court of Appeals was correct in expanding the statute to include traumatic injuries or non-occupational disease claims.

2. Whether the Court of Appeals Opinion upholding the Administrative Law Judge's determination of average weekly wage should be allowed to stand when no evidence exists in the record to support the determination, and such determination is contrary to the Administrative Procedure Act, 5 U.S.C. §§ 554, 557 (c) ("APA").

LIST OF PARTIES

The parties before the Court of Appeals were Margaret L. Johnson, Petitioner and Cross-Respondent and the Director, Office of Workers' Compensation Programs of United States Department of Labor, Todd Pacific Shipyards Corporation and Aetna Casualty and Surety Company, Respondents and Cross-Petitioners.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties i

Opinions Below 2

Jurisdiction 2

Relevant Statutes 2

Statement of the Case 2

Stages At Which The Federal Questions Were Raised and Preserved 5

Basis For Federal Jurisdiction 5

Reasons Why Writ Should Be Granted 5

A. The Opinion Below Was Erroneous 6

1. The Opinion Below Violates The Plain Language Of The Statute. 6

2. The Opinion Below Violates Established Case Law. 8

3. The Decision Below is Without Factual Foundation and is Contrary to the Administrative Procedure Act (APA). 8

Conclusion 10

TABLE OF CONTENTS, *continued*

Page

Appendices:

Appendix A. Administrative Law Judge's Decision . . A-1

Appendix B. Benefits Review Board Decision B-1

Appendix C. Court of Appeals Decision C-1

Appendix D. Court of Appeals Decision Denying Petition for Rehearing *En Banc* D-1

Appendix E. Relevant Statutes E-1

Appendix F. Excerpt of Official Transcript of Proceedings Before Administrative Law Judge F-1

TABLE OF AUTHORITIES

Cases *Page*

Betz v. Arthur Snowden Company, 14 BRBS 805 (1982). . . . 9

Del Vacchio v. Sun Ship Building and Dry Dock Company, 16 BRBS 190 (1984) 6

Director, OWCP v. Palmer Coking Company, 867 F.2d 552 (9th Cir. 1989) 7

Grimes v. Exxon Company U.S.A., 14 BRBS 573 (1981) . . . 9

Ingalls Shipbulding, Inc. v. Director, OWCP, 898 F.2d 1088, 1094 (5th Cir. 1990) 8

Morrison-Knudsen Construction Company v. Director, OWCP, 461 U.S. 624, 103 S. Ct. 2045, 76 L.Ed.2d 194 (1983) 7

Pillsbury v. United Engineering Company, 342 U.S. 197, 199-201 (1952) 8

Potomac Electric Power Company v. Director, OWCP, 449 U.S. 268, 101 S. Ct. 509, 66 L.Ed.2d 446 (1980) 7

Rubin v. United States of America, 449 U.S. 424, 430 (1981) 8

TABLE OF AUTHORITIES, *continued*

Statutes *Page*

5 U.S.C. § 554 1,5,9
§557(c) Administrative Procedure Act i,5,9
§557(c)(3)(a) 9

28 U.S.C. § 1254(1) 2,5

33 U.S.C. § 910(i) Longshore and Harbor Workers' Compensation Act i,1,5,6,7,8
§910(a)(b)(c) 9
§910(d)(1) 9
§910, Section 10 4
§919(d), Section 19(d) 9

Other Authorities

Joint Explanation Statement of the Committee of Conference Submitted in Conjunction with the Longshore and Harbor Workers' Compensation Act, Amendments of 1984, "Determination of Pay" (House of Representatives No. 98-017) 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Todd Pacific Shipyard Corporation, ("Todd") and Aetna Casualty and Surety Company ("Aetna") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which awarded a permanent and total disability to Claimant and held that the time of disability, rather than the time of the accident, should be used to determine the amount of compensation a permanently disabled Claimant should receive for a non-occupational disease claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C Section 910.

OPINIONS BELOW

The Decision and Order of the Administrative Law Judge (Nos. 83-LHC-3224 and 83-LHC-3225) issued July 3, 1984, is not reported but appears as Appendix A (App. A) hereto. The Decision and Order of the Benefits Review Board (No. 84-1813) dated April 20, 1988, is unreported and appears as Appendix B (App. B) hereto. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ____ F.2nd ____ (9th Cir. 1990) and at ____ B.R.B.S.____ (Crt.), from which certiorari is sought, dated August 13, 1990 and appears as Appendix C (App. C) hereto. The Order of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing *En Banc*, dated October 17, 1990, is not reported but appears as Appendix D (App. D) hereto.

JURISDICTION

The Court of Appeals' Opinion in this case was rendered on August 13, 1990 (App. C). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on August 27, 1990, and denied on October 17, 1990 (App. 4). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix E (App. E) hereto.

STATEMENT OF THE CASE

The Claimant, Margaret L. Johnson, was working as a ship scaler for Todd on December 9, 1979, when she fell and injured her left arm and leg. She subsequently filed a timely claim and received medical treatment, including surgery for a bilateral carpal tunnel performed by Dr. Edward E. Almquist.

Claimant returned to work at Todd on June 2, 1980, and thereafter injured her back on August 11, 1980 (she suffered an exacerbation of her back injury in November, 1980). Claimant filed a timely claim and received medical treatment for her August, 1980 injury and the exacerbation of November, 1980. In November, 1982, it was determined by Dr. Almquist, Claimant's treating surgeon, that Claimant had a 20% permanent impairment of function of both hands as a result of the 1979 industrial injury. Claimant continued to work in her usual occupation as a ship scaler from November, 1982 until May 19, 1983. Claimant has not worked since May 19, 1983.

Claimant brought both claims (hands, injury date: December 9, 1979, and back, injury date: August 11, 1980) on for hearing before an Administrative Law Judge on January 24, 1984. At the outset of the hearing certain stipulations were entered into between the parties. As relevant herein, the parties stipulated to the following:

1. Claimant's appropriate average weekly wage for both injuries:

   a. Injury date of December 9, 1979, average weekly wage of $259.32, yielding a compensation rate of $172.80 per week.

   b. Injury date of August 11, 1980, average weekly wage of $519.29, yielding a compensation rate of $342.72 per week.

2. Claimant was last employed on May 19, 1983 and had not returned to her regular employment since. Appendix F.

The Administrative Law Judge held, *inter alia*, that Claimant was permanently and totally disabled as of May 19, 1983, as a result of her hand injury. The Administrative Law Judge further held the parties' specific stipulation regarding the average weekly wage relating to Claimant's back injury of 1980

was the "best evidence" of Claimant's average weekly wage at the time her total disability began on May 19, 1983.

Todd and Aetna appealed from the Decision and Order of the Administrative Law Judge to the Benefits Review Board, contending the appropriate average weekly wage would be that which was stipulated for the date of Claimant's hand injury, *i.e.*, December 9, 1979. Todd and Aetna argued that the Longshore Act requires that an average weekly wage be determined at "the time of the injury". Addtionally, Todd and Aetna argued that there was no evidence to support the Administrative Law Judge's conclusion that the stipulated 1980 average weekly wage applied to the onset of Claimant's total disability status beginning in May 1983.

The Benefits Review Board agreed with Todd and Aetna, holding the appropriate average weekly wage was that which had been stipulated for the 1979 hand injury. Claimant thereafter appealed the decision of the Benefits Review Board to the United States Court of Appeals for the Ninth Circuit. The opinion of the Ninth Circuit reversed the Benefits Review Board and reinstated the average weekly wage calculation of the Administrative Law Judge. The Opinion below held that the time of disability, rather than the time of the accident, should be used to determine the amount of compensation for this permanently disabled Claimant. The Court of Appeals interpreted the "time of injury" language of Section 10 of the Longshore Act, 33 U.S.C. § 910, to mean time of manifestation, rather than the time of the traumatic occurrence. Todd and Aetna filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied by Order of the Court of Appeals, filed on October 17, 1990.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Both Todd and Aetna opposed the average weekly wage determination adopted by the Administrative Law Judge and reinstated by the Opinion of the Court of Appeals. The specific issues raised by this Petition were ruled upon by the Administrative Law Judge, the Benefits Review Board and the Court of Appeals.

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to pass upon the Court of Appeals interpretation of 33 U.S.C. § 910.

REASONS WHY WRIT SHOULD BE GRANTED

The Court of Appeals has erroneously expanded the unambiguous language of the Longshore Act (33 U.S.C. § 910 (i)) by defining the "time of injury" to mean the time of manifestation of the complete effects of a specific traumatic injury. The plain language of the Longshore Act requires a contrary result.

The decision of the Administrative Law Judge to apply the parties' stipulated average weekly wage for a 1980 back injury to the 1983 manifestation of Claimant's permanent total disability is without factual support in the record and is contrary to law. No evidence exists in the record to support the Administrative Law Judge's conclusion that the parties' specific stipulation of a 1980 average weekly wage is applicable to the Claimant's 1983 onset of permanent total disability. Further, the Administrative Law Judge's failure to explain his decision by way of "findings and conclusions" is violative of the Administrative Procedure Act (5 U.S.C. §§ 554, 557 (c)) ("APA").

A. The Opinion Below Was Erroneous

The opinion of the Court of Appeals will impact a multitude of employees, employers and insurers as well as the United States Department of Labor. Therefore, the opinion of the Court of Appeals would warrant plenary review by this Court, even if the result reached were a correct one. The fact is, however, that the opinion below is demonstrably wrong for a number of reasons.

1. The Opinion Below Violates The Plain Language Of The Statute.

The opinion below fails to recognize the clear distinction Congress has established between traumatic injuries and occupational diseases for purposes of determining "the date of injury" when calculating average weekly wage. The Longshore Act provides in pertinent part:

> "The average weekly wage of the injured person at *the time of injury* shall be taken as a basis upon which to compute compensation." 33 U.S.C. § 910.

(Emphasis added).

Likewise, the case law recognizes payments are based upon the average weekly wage rate at the time of the injury for which compensation is claimed. *Del Vacchio v. Sun Ship Building and Dry Dock Company*, 16 BRBS 190, 193 (1984).

In 1984 Congress amended the Longshore Act and specifically addressed the issue of calculating average weekly wage when the claim for benefits was the result of an occupational disease. As amended, the Longshore Act provides:

> For purposes of this section with respect to a claim for compensation for death or disability *due to an occupational disease* which does not immediately result in death

> or disability, the time of injury shall be deemed to be the date on which the employee or Claimant became aware . . . of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i) (1984).

(Emphasis added).

However, the opinion of the Court of Appeals attempts to discern a different meaning than that which is evident from the plain reading of the unambiguous language of the amended statute, *i.e.*, that defining "the time of injury" for the purpose of calculating average weeky wage is limited to "death or disability due to an occupational disease . . ." (33 U.S.C. § 910(i)).

The opinion below ignores the statutory history of the 1984 amendments which clearly evidences congressional intent:

> The "time of injury" for cases *involving an occupational disease* shall be the time when the Claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the employment, the disease, and the death or disability. The conferees specifically reject the date of last exposure to the injurious substance as the date of injury for determination of pay purposes. *Joint Explanation Statement of the Committee of Conference Submitted in Conjunction with the Longshore and Harbor Workers' Compensation Act*, Amendments of 1984, "Determination of Pay" (House of Representatives No. 98-017).

(Emphasis added).

Finally, both this Court and the Ninth Circuit have ruled the Longshore Act may not be expanded beyond its plain language. *Morrison-Knudsen Construction Company v. Director, OWCP*, 461 U.S. 624, 103 S. Ct. 2045, 76 L.Ed.2d 194 (1983), *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509, 66 L.Ed.2d 446 (1980), *See Director, OWCP v. Palmer Coking Company*, 867 F.2d 552 (9th Cir. 1989)

(Ninth Circuit concluded that even if Congress made an error drafting Section 22 of the Longshore Act, it was for Congress to correct rather than for the courts to expand the meaning of the statute).

2. The Opinion Below Violates Established Case Law.

The Longshore Act (33 U.S.C. § 910 (i)) provides a method of calculation of the average weekly wage specific to claims resulting from an occupational disease. The Court of Appeals has expanded the reach of this statute to include traumatic injuries or non-occupational disease claims. The Court of Appeals, in effect, has added text where none existed previously.

This Court has refused to alter the clear meaning of the Longshore Act under the guise of statutory construction, because only Congress may change the meaning of the Longshore Act. *Pillsbury v. United Engineering Company*, 342 U.S. 197, 199-201 (1952); *Ingalls Shipbulding, Inc. v. Director, OWCP*, 898 F.2d 1088, 1094 (5th Cir. 1990) (Inequitable result may not be avoided by court changing the Longshore Act. Plain language of the statute controls): *See Rubin v. United States of America*, 449 U.S. 424, 430 (1981) (When the terms of the statute are unambiguous, judicial inquiry ends).

3. The Decision Below is Without Factual Foundation and is Contrary to the Administrative Procedure Act (APA).

The Decision below lacks any factual support for its determination of Claimant's average weekly wage. The parties entered into stipulations regarding two average weekly wage computations. These stipulations were specific with respect to date of injury, type of injury and dollar amount. None of the facts to which the parties stipulated related to the 1983 average weekly wage determination of the Administrative Law Judge, nor could such stipulations have related or been relevant to a determination of a 1983 average weekly wage.

A computation of average weekly wage under the Longshore Act requires, first, that a determination of a Claimant's "average annual earnings" be determined. (33 U.S.C. § 910(a), (b) or (c)). Thereafter the average weekly wage is computed from the average annual earnings. (33 U.S.C. § 910(d)(1)). Since the stipulations of the parties were date specific (1979 and 1980) and such dates were not within fifty-two (52) weeks of the 1983 total disability onset determination of the Administrative Law Judge, the stipulations could not provide a factual basis for determining Claimant's average weekly wage as of May 19, 1983.

The Administrative Law Judge substantially modified the parties' stipulations to arrive at his holding regarding the Claimant's 1983 average weekly wage. It appears the Administrative Law Judge performed these modifications by borrowing from each of the parties' stipulations. However, since the Administrative Law Judge failed to indicate his method, or in any manner explain his legal alchemy, the basis for the Administrative Law Judge's Decision remains unexplained and a subject of pure speculation.

Although an Administrative Law Judge is not obligated to accept all stipulations, an Administrative Law Judge must adequately explain a rejection or modification of any such stipulation. *Grimes v. Exxon Company U.S.A.*, 14 BRBS 573 (1981), *See Betz v. Arthur Snowden Company*, 14 BRBS 805 (1982). Section 19(d) of the Longshore Act (33 U.S.C. § 919(d)) requires that hearings conducted by Administrative Law Judges on cases arising under the Longshore Act comply with the provisions of the Administrative Procedure Act ("APA") (5 U.S.C. §§ 554, 557(c)). The APA requires that decisions rendered by an Administrative Law Judge include a statement of "findings and conclusions, on the reasons or basis therefore on all material issues, of fact, law, or discretion presented on the record." (5 U.S.C. § 557(c)(3)(a)). *Grimes v. Exxon Company, U.S.C.*, 14 BRBS 573 at 576 (1981).

CONCLUSION

The Court of Appeals is not empowered to invade the province of Congress and by so doing, rewrite the clear language of the Longshore Act. Nor should a clear violation of law ("APA") be allowed to stand. The opinion below mandates an exercise of this Court's supervisory powers. Todd Pacific Shipyards Corporation and Aetna Casulaty and Surety Company respectfully urge the Court to review the Opinion of the Court of Appeals.

Respectfully submitted this 15th day of January, 1991.

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APPENDIX A

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In the Matter of MARGARET L. JOHNSON Claimant v. TODD PACIFIC SHIPYARDS CORP. Employer AETNA CASUALTY & SURETY CO. Carrier	CASE Nos. 83-LHC-3224 83-LHC-3225 OWCP Nos. 14-49748 14-60814 COPY RECEIVED JULY 19 1984 SCHROETER, GOLDMARK AND BENDER

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Before: HENRY B. LASKY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Introduction

Claimant seeks benefits under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901, *et seq.*, hereinafter referred to as the Act. The hearing was held in Seattle, Washington on January 24, 1984. At the outset of the hearing, the parties entered into specific stipulations with reference to the claims herein. Five stipulations apply to both cases: (1) Employer and Claimant were in an employer-employee relationship at all times relevant; (2) the parties were subject to the provisions of the Act; (3) Claimant filed a claim for compensation in both cases on December 2, 1981; (4) Carrier has paid for medical services under Section 7 of the Act; and, (5) Claimant was last employed on May 19, 1983 and has not returned to her regular employment since. Stipulations applicable to Case No. 83-LHC-3224 are: (1) the alleged injury occurred on December 9, 1979; (2) Employer filed a notice of controversion on January 21, 1983; (3) Employer filed a first report of accident on December 12, 1979; (4) Claimant's average weekly wage as of December 9, 1979 was $259.32, yielding a compensation rate of $172.80 per week; and, (5) Employer voluntarily paid compensation to Claimant from December 10, 1979 through December 16, 1979, February 25, 1980 through June 1, 1980 and November 4, 1980 through September 8, 1983 in the total amount of $17,580.00. Applicable to Case No. 83-LHC-3225 are: (1) the alleged injury occurred on August 11, 1980; (2) Employer filed a notice of controversion on January 13, 1982; (3) employer filed a first report of accident on November 10, 1980; (4) Claimant's average weekly wage as of August 11, 1980 was $519.29, yielding an appropriate compensation rate of $342.73; and, (5) Employer voluntarily paid compensation to Claimant from November 7, 1980 through July 20, 1981 in the total amount of $12,085.40.

Issues requiring resolution are: (1) duration of Claimant's temporary total disability; (2) nature and extent of Claimant's disability; (3) whether Claimant's injuries arose out of and were incurred in the course of Claimant's employment; (4) whether or not the claims are barred by the statutes of limitations contained in Sections 12 and 13; (5) whether or not a penalty is due under Section 14(e); (6) whether or not Section 8(f) applies; and, (7) fees and costs.

Claimant's Exhibits (Cl. Exs.) 1 through 17 and Employer's Exhibits (Er. Exs.) A through K were admitted at the hearing. The record was held open until: (1) February 24, 1984 for submission of post-hearing evidence and depositions; (2) March 26, 1984 for submission of post-hearing briefs and the fee applications; and, (3) April 9, 1984 for objections to the fee application.

II. Facts

Claimant, Margaret L. Johnson, was born on December 20, 1920. She has an eleventh grade education and a sporadic employment history of doing laundry, cooking and factory work. (Tr. 28). She stands five feet three inches tall and weights [*sic*] approximately one hundred and eighty pounds. (Er. Ex. M-1). She began longshoring as a scaler for Lockheed Shipyards in October of 1978. (Er. Ex. A).

The evidence in this case is voluminous and the manner of presentation resulted in the obfuscation rather than clarification of the issues.

Ms. Johnson sought treatment for arm, back and urinary tract pain from the office of Robert J. Riley, Doctor of Osteopathy, beginning in 1971. [Deposition of Dr. Riley (henceforward D.R.) p. 1]. To the present she remains a frequent patron of Dr. Riley's. For the sake of concision, only those visits of major significance are discussed.

On June 4, 1976 Dr. Riley completed a Washington State Department of Social and Health Services form medical report in which he concluded that Claimant was unable to engage in any type of physical labor due to osteoarthritis of the hands and high blood pressure. (D.R. at pp. 104-106). He treated these conditions with medication and recommended a diet. In one of the more bizarre aspects of this case, Dr. Riley's records reflect that on June 30, 1976 Claimant complained of elevated back pain after consuming an unspecified amount of Almond Roca ice cream. The Doctor offered no medical explanation for this phenomenon. (D.R. at p. 44). In January, 1978 Claimant's hand condition worsened and Dr. Riley referred her to a hand surgeon, but Ms. Johnson refused to undergo recommended surgery. Instead, Dr. Riley treated her with ultrasound three times weekly through June, 1978. (D.R. at pp. 16-17). In June, 1978 Dr. Riley treated Claimant's low back pain with diathermy and osteopatic [sic] manipulation. A lumbar x-ray was unremarkable. (D.R. at p. 40, D.R. at p. 15).

On November 16, 1978, while on the job at Lockheed Shipyards, Claimant fell and landed on her left hand. Dr. Riley saw her on November 18 and observed a swelling in both hands that had not been noticed before. (D.R. at p. 14). A December 1, 1978 entry recounts that on October 25, 1978 a bunk or box had fallen on Ms. Johnson's left hand, but she waited until December to seek treatment for it. Dr. Riley x-rayed the hand and concluded nothing was wrong with it. (D.R. at p. 40; Er. Ex. A).

Claimant was back to see Dr. Riley in January, 1979 again complaining of pain and swelling in the hands. Dr. Riley this time equivocally diagnosed bilateral carpal tunnel syndrome and again referred Claimant to a hand surgeon, only to have her refuse surgery again. Instead, she resumed the ultrasound treatment which she continued through June, 1979. (D.R. at pp. 16-19).

On April 27, 1979 Dr. Riley addressed a letter to the Washington State Department of Social and Health Services, Disability Insurance Section in which he described Claimant as suffering from hypertension, osteoarthritiss [*sic*], allergies, diabetes mellitus and carpal tunnel syndrome. (D.R. pp. 127-128). The letter was in reference to Ms. Johnson's application for social security disability benefits. (D.R. at p. 26).

Ms. Johnson reported for work at Todd Shipyards on June 17, 1979. (Er. Ex. B). She did so against Dr. Riley's advice. (D.R. at p. 20). On December 9, 1979 Claimant fell through a hole in a floor while on the job and suffered bruises to the left arm and leg. (Er. Ex. D). She filed an LS-202 on December 12, 1979 (*Id.*) She took industrial sick leave from December 11 to December 17, 1979. (Er. Ex. B). She then worked until February 25, 1980 when she again took industrial sick leave in order to undergo a bilateral carpal tunnel release at the hands of Board-certified orthopedic surgeon Dr. Edward E. Almquist. [Deposition of Dr. Almquist (henceforward D.A.); Tr. at p. 34; Cl. Ex. 8].

Claimant returned to work at Todd on June 2, 1980. On August 11, 1980 Ms. Johnson reported to the Todd dispensary complaining of having strained her back while washing an aluminum wall. She was assessed by the dispensary personnel as having moderate strains of the left latissimus dorsi and left trapezius. Rest, massage and Norgesic Forte were prescribed (Cl. Ex. 10). An LS-202 was filed on this incident on November 10, 1980. (Cl. Ex. 11).

On November 4, 1980, while polishing steel tanks at Todd, Claimant heard something pop in her back. (D.R. at p. 102). She went to Dr. Riley's office where her complaints of pain and spasm along paravertebral L2-L5 on the left were recorded. (D.R. at pp. 8-13, 100-103). An LS-202 was filed on November 10, 1980. (Cl. Ex. 11).

Claimant continued to work and to visit Dr. Riley's office. Dr. Riley treated her with traction, back manipulations, diathermy, and anti-inflammatory drugs. (D.R. at pp. 60-64). In March of 1981 she had a flare-up of pain in the right arm and right thumb. Dr. Riley opined that swings in barometric pressure — which cause changes in synovial fluid — were responsible. (D.R. at p. 65). In an April 23, 1981 medical summary Dr. Riley concluded that Ms. Johnson will suffer no permanent partial disability due to her back, but declined to speculate on the progress of her hands. (D.R. at pp. 156-157).

Dr. Riley referred Claimant to Board-certified orthopedic surgeon Dr. James B. Smith for a June 1, 1981 neurological examination. (Cl. Ex. 15). Without viewing her x-rays Dr. Smith concluded that Claimant suffered from no serious structural disorder, but had strained some back muscles which had at that point resolved. (*Id.*) On September 4, 1981 Claimant underwent a synovectomy and release of her right thumb, again at the hands of Dr. Almquist. (Cl. Ex. 6). She did not return to work until February 22, 1982. (Er. Ex. B; Tr. 45). At Employer-Carrier's request Claimant was administered a neurological examination on November 17, 1981 by Board-certified orthopedic surgeon Dr. Ivar W. Birkeland. Dr. Birkeland found Claimant's condition to be essentially normal, with good ranges of motion, no muscle spasm and normal x-rays. He reasoned that Ms. Johnson probably had sprained her back slightly but that her obesity and the osteopathic back manipulations hampered her recovery by over-stressing and even respraining the back. Dr. Birkeland rated her category 1 based on her subjective complaints only. (Deposition of Dr. Birkeland).

On December 2, 1981 Claimant filed LS-203's for the December 12, 1979 fall and the August, 1980 back strain. (Cl. Exs. 2 and 13). Dr. Riley found improved ranges of motion in a December 30, 1981 examination (D.R. at p. 75), but based upon a March 24, 1982 examination he evaluated her as having

a permanent partial disability caused by her hands both at twenty percent of normal. (D.R. at p. 232). Then, in an April 28, 1982 letter, Dr. Riley rated Claimant's lumbosacral impairment as a category 1 permanent partial disability. (D.R. at p. 233). Claimant's attorney wrote Dr. Riley on June 24, 1982 informing him that a category 1 disability amounts to zero percent permanent partial disability and requesting "clarification" of the April 28, 1982 letter. (D.R. at p. 246). Dr. Riley obligingly responded on September 1, 1982, altering his rating to category 2. (D.R. at p. 256). Dr. Riley stuck by the category 2 or five percent rating in his deposition. (D.R. at pp. 124-125).

In the meantime, Claimant struck her knee in late July, 1982 and visited Dr. Riley in August, 1982 complaining that the blow to the knee had resulted in an injury to her ankle. (D.R. at pp. 81-86). Although even Dr. Riley failed to surmise a medical explanation for this phenomenon he went ahead and treated the pain with megathermy. (*Id.*). Claimant missed work from August 6 to September 13, 1982. Claimant worked from September 13, 1982 to November 12, 1982. She then took industrial sick leave until January 10, 1983. Her last period of work was from January to May 23, 1983. (Er. Ex. B).

Ms. Johnson was fitted for a transcutaneous nerve stimulator on November 23, 1982. (D.R. at p. 65). On the next day Dr. Almquist issued a letter stating that Claimant has a twenty percent impairment of function of her hands as a result of the 1979 injury. (cl. Ex. 6). Dr. H. Doyle Perkins administered an independent medical examination to Claimant on December 16, 1982. Dr. Perkins diagnosed lumbosacral strain with mild spasm and minimal left sciatic irritation and hypertension. He interpreted a spinal x-ray as showing mild degenerative changes at the L4-5, S-1 level with no acute pathology. (D.R. at pp. 272-273).

Board-certified orthopedic surgeon Dr. John F. Burns saw Ms. Johnson on January 17, 1983. He diagnosed unexplainable pain in the left arm and pain in the lumbar spine related to her history of strain as well as her status post-bilateral carpal tunnel release and obesity. [Deposition of Dr. Burns (henceforward D. Burns) at pp. 8-9]. On February 8, 1983 Dr. Riley added bursitis, myositis and fibrositis to his diagnoses of Claimant's hand condition. (D.R. at p. 89). From March through May, 1983 suffered some aggravations and migrations of her back pain. (D.R. at pp. 91-94). A May 10, 1983 lumbar CAT scan revealed central stenosis at the L4-L5 disc, but showed no gross abnormality or evidence of herniation. (D.R. at p. 303). Board-certified orthopedic surgeon St. Elmo Newton saw Ms. Johnson in a neurological examination on June 1, 1983. He diagnosed mild degenerative changes in her back and a superimposed strain. (Cl. Ex. 16).

Employer-Carrier filed its notice of final payment of compensation on September 8, 1983. (Cl. Ex. 4).

Vocational rehabilitation counselor Frank C. Swinehart conducted a five-hour evaluation of Ms. Johnson on November 10, 1983. Based on the results of tests administered and on an interview Mr. Swinehart concluded that there is no job in the competitive labor market in which Claimant could engage or obtain. (cl. Ex. 17).

Ms. Johnson's claim for Social Security disability benefits was denied on November 8, 1983. (Er. Ex. N).

Psychologist Dr. Harry C. Springer met with Ms. Johnson on January 4, 1984 for a vocational assessment interview. Dr. Springer concluded that, given Claimant's age, education, prior work experience, and physical limitations she could be employed on a sustained basis. (Er. Exs. M-1 and M-2).

On January 17, 1984, Board-certified orthopedic surgeon Dr. Stanley J. Bigos was deposed. He recounted two examinations of Ms. Johnson by the Orthopedic Panel consultants

which diagnosed her as: "1. Status post multiple strains, lumbar spine, related," by history to industrial injury. "2. Exogenous obesity, unrelated; 3. Degenerative disc changes, lumbar spine, unrelated." (Deposition of Dr. Bigos at pp. 21-22). Dr. Bigos asserted that there is no objective evidence to substantiate Claimant's complaints. (*Id.* at p. 24).

III. Law

A. Section 12 Notice

Although it was raised at the hearing, the issue of timely notice is absent from Employer-Carrier's brief. It is a threshold issue, however, so it is treated here.

Section 12 of the Act provides that notice of an injury shall be given within thirty days after the date of such injury or thirty days after the employee is aware or in the exercise of reasonable diligence should have been aware of a relationship between her injury and her employment. Here, Claimant alleges her hands were injured in the December 9, 1979 fall, but it was stipulated that the LS-202 was filed on February 2, 1979, beyond the thirty-day limit. Claimant's failure to give notice until almost two months had passed since her fall is excusable. Dr Riley's chart notes reveal that he was unsure what the hand condition was in a January 18, 1979 visit, diagnosing that it "may be nerve injury to hand *i.e.* carpal tunnell [*sic*]." (D.R. at p. 18). A positive diagnosis was not made until later. (*Id.*) In light of her lack of both education and overall sophistication, holding Ms. Johnson to a higher standard of knowledge of her condition than that her physician lived up to would be ridiculous. I find that Claimant was not aware nor even should have been aware that the fall resulted in the injury of bilatral [*sic*] carpal tunnel syndrome until February 16, 1979 when Dr. Riley positively diagnosed the condition.

In reference to the back injury, Employer-Carrier had access to facts which reasonably should have led it to believe that liability for compensation was possible by virtue of the August 11, 1980 dispensary report. [Cl. Ex. 10a; *Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24 (1975), (D.R. at *aff'd* mem. 547 F.2d 706].

Section 12 does not bar either claim.

B. Section 13

Under Section 13 the right to compensation will be barred unless claim is filed one year after the injury or, if, as is the case here, payment of compensation has been made without an award the claim must be filed within one year after the date of the last payment. No award has been made for either claim. Both claims are timely because they were filed within one year after the Employer-Carrier's final compensation payment. The last payment of compensation for the December, 1979 fall was made on September 8, 1983. The claim already had been filed on December 2, 1981. The last payment of compensation for the August, 1980 back strain was made on July 20, 1981. That claim was filed on December 2, 1981 also.

Section 13 does not bar either claim.

C. Duration of Temporary Total Disability

Claimant, in her post-hearing memorandum, seeks compensation for what she claims is unpaid time lost from September 4, 1981 to May 24, 1982 attributable to her recovery from hand surgery. This claim is puzzling in light of Claimant's stipulation that she was paid compensation for the hands' condition from November 4, 1980 through September 8, 1983. Accordingly, I find no additional amount due and owing for any temporary total disability.

D. Do the Injuries Arise Out of and Were They Incurred in the Course of Claimant's Employment?

1. *The Hands*

Employer-Carrier attempts to limit this inquiry to consideration of the carpal tunnel syndrome present in Claimant's left hand only. It argues that that syndrome preceded Claimant's employment at Todd and, in any event, Todd should be liable only for any aggravation resulting from the December, 1979 fall in which Employer alleges trauma was inflicted to Claimant's left hand only. Employer-Carrier misstates the maladies which attack Ms. Johnson's hands as well as their causes. As hand surgeon Edward Almquist testified, Claimant suffered from bilateral carpal tunnel syndrome which, to a reasonable medical certainty was caused by both the fall and by merely using the hands on the job. Claimant was exposed to both causative factors while in Todd's employ, rendering Todd responsible for the bilateral carpal tunnel syndrome. It matters not that this condition may have pre-existed the Todd employment (in fact Employer-Carrier has not convincingly shown that it did) for the fall and the hand use certainly aggravated, accelerated, exacerbated, contributed, or combined with any pre-existing carpal tunnel maladies. [*See: Mulligan v. Haughton Elevator,* (1980) 12 BRBS 99].

Carpal tunnel syndrome is not the only condition which afflicted Claimant's hands. Dr. Almquist testified that it had resolved, yet he still ascribed Claimant a bilateral permanent partial hand disability based on chronic tendonitis and arthritis aggravated by on-the-job hand use. Again, in assigning liability for the resultant disability to Employer-Carrier it matters not that Ms. Johnson had a propensity towards these conditions or even that they in some degree existed before her employment at Todd. (*Mulligan v. Haughton Elevator, supra.*)

I find that the hands' condition arose out of and was incurred in Claimant's employment at Todd.

2. ***The Back***

Employer-Carrier does not seriously dispute that Claimant suffered a lower back strain in August, 1980 and an exacerbation thereof in November, 1980, both of which occurred on the job. Claimant's testimony and the evidence on this issue are credible and uncontroverted.

I find that Ms. Johnson suffered a back sprain in the August, 1980 incident and an exacerbation thereof in November, 1980 that arose out of and were incurred in the course of her employment.

E. Nature and Extent of Disability

1. ***The Back***

The evidence is heavily stacked against the conclusion that Claimant suffers any ratable disability caused by the strain to her back. Arguing against disability are Board-certified orthopedic surgeons Dr. John F. Burns, Dr. Ivar Birkeland, Dr. Stanley Bigos and Dr. Loy Cramer (the latter two were members of the Orthopedic Panel Consultants in whose assessment joined Dr. H. Doyle Perkins, Dr. Phillip Grisham and Dr. Chapman, all three of unknown qualifications.) All these doctors cite the absence of objective data to support Claimant's complaints of pain.

Dr. Riley stands alone in assigning Claimant a category 2 disability attributable to the back injury. Aside from the weight of authority contradicting it there are two other matters which cast doubt on Dr. Riley's assessment. First is the fact that Dr. Riley altered his original conclusion of category 1 or zero percent disability only after receiving the letter from Claimant's attorney. This alteration appears to be at best disingenuous. Second is the matter of Dr. Riley's qualifications. A doctor of osteopathy is not a Board-certified orthopedic surgeon.

I find that Claimant has no ratable disability attributable to her back strain.

2. ***The Hands***

The condition of Claimant's hands is another matter. Despite the resolution of the carpal tunnel syndrome, Dr. Almquist concluded that Claimant suffers from a twenty percent bilateral permanent impairment of the use of her hands. Vocational counselor Frank Swinehart took due note of Claimant's deficient manual dexterity which revealed itself in testing he administered in concluding that there is no job in the competitive labor market in which Mrs. [*sic*] Johnson can engage or obtain. Other factors Mr. Swinehart relied on are Claimant's demonstrated inability to benefit from her education, her poor scores on aptitude tests, and her age all of which indicate she is a poor candidate for vocational rehabilitation or retraining. Accordingly, I find that Claimant has shown that she is unable to return to her usual employment as a ship's scaler because of the work-related aggravation of arthritis and tendonitis in her hands.

Once a claimant establishes that she is unable to return to her usual employment because of a work-related injury, the burden shifts to the employer-carrier to demonstrate the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 10 BRBS 81, 592 F.2d 762 (4th Cir. 1979), *aff'g Chappell v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 77-375 (March 31, 1978); *Diamond M. Drilling Co. v. Marshall*, 8 BRBS 658, 577 F.2d 1003 (5th Cir. 1978), *aff'g* 6 BRBS 114, BRB No. 76-433 (1977); *American Stevedores, Inc. v. Salzano*, 4 BRBS 195, 538 F.2d 933 (2nd Cir. 1976), *aff'g* 2 BRBS 178, BRB Nos. 74-233/A (1975). Although Employer-Carrier need not actually secure Claimant a job, it must show actual, not theoretical, job opportunities within the geographical area where Claimant resides at the onset of disability which Claimant, by virtue of her age, education, work experience and current physical and mental capabilities, can realistically compete

for, secure and perform. [*Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978); and, *Elliott v. C & P Telephone Co.*, BBB No. 81-593 (January 20, 1984)]. Additionally, it has been held that an employer's mere perusal of help wanted advertisements and employment office job openings fails to establish the availability of realistic alternative job opportunities for the Claimant. [*Barrios v. Port Houston Marine Co.*, (1983) 16 BRBS 1 (ALJ)].

Employer-Carrier contends that the vocational assessment and labor market survey performed by psychologist Dr. Harry C. Springer (Er. Exs. M-1 and M-2) meet the above standard. I disagree. Each and every job Dr. Springer lists was derived through the discredited method of merely perusing the help wanted advertisements of the Seattle Times or Seattle area Employment Security Offices. The flaw inherent in this method of labor market surveying is simple. It does not take a Claimant's age or physical and mental restrictions into account as not one of those potential employers can be said to actually be willing to offer a person such as Ms. Johnson a job. None of those employers was informed of Claimant's deficiencies and still said it would consider employing such a person. It is impossible for me to determine whether the employers listed would consider a person like Claimant for the jobs listed.

There are several other things that cast doubt on Dr. Springer's reports. First is the fact that Dr. Springer eschews Claimant's poor scores on the manual dexterity tests he administered in arriving at his conclusions. Second is that Dr. Springer finds undue great significance in Claimant's application for Social Security disability and other assistance benefits when he inveighs against her dedication to return to work. Of all the professionals Claimant has been scrutinized br Dr. Springer is alone in doubting Claimant's desire to return to work. Third is a factual inconsistency. In his vocational

assessment Dr. Springer records that Claimant arrived at the interview in a cab, but he then goes on to describe the kind of automobile she owns and notes that she was "observed exiting from and entering her vehicle without apparent difficulty." Fourth is Dr. Springer's regrettable propensity to quote case law in his reports. As a vocational counselor, he especially should be cognizant of the dangers which inhere in assuming tasks beyond one's professional qualifications.

Accordingly, I find that Claimant is permanently and totally disabled by the tendonitis and arthritis which afflict her hands. Employer-Carrier has not established the existence of suitable alternative opportunities.

Even though Ms. Johnson's disability involves an injury to her hands, she is not limited to recovery under the Section 8(c) schedule because her disability is total, not partial, in nature. [*See: Potomac Electric Power Co. v. Director, OWCP,* (1980) 101 S.Ct. 509, 514 fns. 17 and 18].

F. Average Weekly Wage

The best evidence of Claimant's average weekly wage before me is the stipulated $519.29 yielding a compensation rate of $342.73 per week. It reflects the parties best estimation of Claimant's wage most recent earning capacity before said capacity was impaired by the condition of Claimant's hands. Accordingly, I so find.

G. Section 14(e) Penalty

Although it was raised as an issue, Claimant failed to brief or argue for the imposition of Section 14(e) penalties. Nevertheless, such penalties are computed on all amounts of compensation remaining unpaid between the time the notice of controversion should have been filed and the time the notice

is actually filed or the Department of Labor acquired knowledge of the facts that a proper notice would have revealed. [*National Steel & Shipbuilding Co. v. U.S. Department of Labor,* (9th Cir. 1979) 606 F.2d 875]. As far as the hand injury is concerned no penalty is appropriate because, as stipulated, Employer controverted the claim while paying voluntary compensation and continued paying. Regarding the back injury, the controversy arose on December 2, 1981 when the claim was filed and Employer controverted on January 13, 1982. Consequently, any penalty due is minimal, and, as Claimant demonstrated by failing to brief or argue, the issue unworthy of consideration.

H. Section 8(f)

The Employer asserts its entitlement to relief under Section 8(f) of the Act and for the Employer to obtain the benefit of the aforesaid section, it must be shown that: 1) Claimant had an existing permanent partial disability prior to her injury of May 7, 1979; 2) that such disability was manifest to the Employer; and that 3) the current disability is not due solely to the injury of May 7, 1979. *Director v. Campbell Industries,* 14 BRBS 974 (1982). The evidence is abundantly clear herein that Claimant had prior orthopedic injuries which would have motivated a cautious Employer to discharge or not to retain the Claimant in its employ because of a greatly increased risk of employment-related accident and compensation liability. These prior injuries to Claimant's hands contributed to her chronic arthritis and tendonitis of the hands to make such conditions materially and substantially greater than it would have been otherwise as reflected by the testimony of Dr. Edward Almquist. Clearly, the existence of the prior injuries were manifest to the Employer through medical records which were in existence and available to the Employer. *See Lowry v. Willamette Iron & Steel,* 11 BRBS 372 (1979); *Lloyd v. Seattle Stevedore Co.,* 8 BRBS 594 (1978). Under the circumstances, it would appear that the applicability of Section 8(f) of the Act is mandated.

All computations provided for in this decision and order are to be made by the Deputy Commissioner in accordance with the terms of this decision and order, and applicable provisions of the Act and regulations. All computations set forth herein are subject to verification by the Deputy Commissioner.

Order

1. Employer-Carrier shall pay to Claimant compensation for permanent total disability from May 19, 1983, for a period of 104 weeks and thereafter said payment shall be made by the Special Fund pursuant to Section 44 of the Act. These payments shall be made at the appropriate compensation rate of $342.73 per week based upon Claimant's average weekly wage of $519.29.

2. The Employer-Carrier or the Special Fund shall further pay to Claimant interest at the rate calculated under 28 U.S.C. § 196 as required by *Grant v. Portland Stevedoring*, BRB No. 81-400, on the balance of all compensation due and payable to the Claimant after credit is taken for compensation payments previously made to her, computed from the date that each payment was due until the date of actual payment by either Employer-Carrier or the Special Fund as required herein.

3. Employer-Carrier shall continue to pay for medical treatment and expenses as the nature of Claimant's hands and back conditions may require in the future.

4. Counsel for Claimant has applied for fees and costs in accordance with 20 C.F.R. § 701.132, for all services and costs rendered or incurred on or after April 22, 1983 when this case was transferred to the Office of Administrative Law Judges for hearing. The application is for 20.1 hours (.6 of an hour of services was rendered before the case was transferred

to this office) of services at $100.00 per hour and $1,157.75 in costs, for a total of $3,167.75. No objections to this fee application having been received by the deadline, it is hereby ordered that Employer pay to counsel for Claimant $3,167.75 for fees, costs and services rendered or incurred on or after April 22, 1983.

s/HENRY B. LASKY
Administrative Law Judge

Dated: 3 JUL 1984
San Francisco, California

HBL:csw

APPENDIX B

U. S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th St. N.W.
Washington, D.C. 20036

MARGARET L. JOHNSON
Claimant-Respondent

v.

TODD PACIFIC SHIPYARDS CORPORATION

and

AETNA CASUALTY & SURETY COMPANY
Employer/Carrier-Petititoners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

BRB No. 84-1813

NOT-PUBLISHED

FILED AS PART OF THE RECORD

APR 20 1988

s/Linda M. Merkias
Clerk of the Board
Benefit Review Board

DECISION and ORDER

Appeal of the Decision and Order of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Janet Lane Eaton (Schroeter, Goldmark & Bender), Seattle, Washington, for claimant.

Russel [*sic*] A. Metz (Witherspoon, Kelley, Davenport & Toole, P.S.), Seattle, Washington, for employer/carrier.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and TAIT, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (83-LHC-3224, 3225) of Administrative Law Judge Henry B. Lasky awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921 (b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On December 9, 1979, in the course of her employment as a scaler, claimant fell through an opening in the engine room floor of a vessel, injuring her left hand and wrist, and her left hip. Following the accident, claimant was treated at employer's dispensary and at a local hospital, and was released to return to work the next day. On December 10, 1979, claimant filed an injury report with employer, stating that she injured her left arm and leg. That same day, claimant was examined by Dr. Smith, who recommended that claimant remain off from work for approximately one week. Thereafter, claimant was seen by Dr. Petrie, who examined claimant and released her to return to work on December 17, 1979. Claimant returned to work on that date, but continued to experience pain in both hands. Claimant was subsequently examined by Dr. Almquist,

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921 (b)(5) (Supp. III 1986).

who diagnosed claimant as suffering from bilateral carpal tunnel syndrome. On February 26, 1980, Dr. Almquist performed carpal tunnel release surgery on both of claimant's wrists, and after supervising claimant's therapy and recovery, Dr. Almquist released claimant to return to work on June 2, 1980. Claimant returned to work, but continued to experience pain in her right thumb. Dr. Almquist treated claimant conservatively for several months for this pain, and subsequently performed surgery on the thumb to relieve the pain. Claimant last worked on May 23, 1983.

The evidence of record indicates that claimant had a history of carpal tunnel syndrome dating back to her previous employment as a scaler at Lockheed Shipbuilding Company. During this time, claimant was treated br Dr. Riley, who recommended that claimant stop working as a scaler because of her carpal tunnel syndrome and osteoarthritis. Claimant was subsequently laid off by Lockheed, and shortly thereafter claimant obtained employment as a scaler with employer, contrary to the recommendations of Dr. Riley.

On December 2, 1981, claimant filed a claim for compensation for the injuries she sustained in the December 1979 accident. In this claim, claimant listed her injuries from the accident as injuries to both hands and to her left hip and leg.[1]

After reviewing the evidence of record, the administrative law judge found that the claim was not barred by Sections 12 and 13 of the Act, 33 U.S.C. §§ 912, 913, and that claimant's carpal tunnel syndrome arose out from her employment with employer. The administrative law judge further found that claimant was unable to return to work for employer because

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[1] On December 2, 1981, claimant also filed a claim for compensation for a back injury sustained on August 11, 1980. The administrative law judge found that claimant suffered no disability as a result of this injury. This finding has not been challenged on appeal, and is therefore affirmed.

of her hand condition, that employer failed to establish the existence of suitable alternative employment for claimant, and that claimant was therefore permanently totally disabled by her carpal tunnel syndrome. 33 U.S.C. § 908(a). Finally, the administrative law judge based claimant's award on an average weekly wage of $519.29, and found that employer is entitled to relief pursuant to Section 8(f) of the Act. 33 U.S.C. § 908(f).

On appeal, employer contends that the administrative law judge erred by finding claimant gave employer timely notice of her injury to her right hand as required by Section 12 of the Act. Specifically, employer contends the administrative law judge erroneously determined claimant's date of awareness for Section 12 purposes. Employer further contends that the administrative law judge's finding of permanent total disability is not supported by substantial evidence, that the administrative law judge's discrediting of employer's vocational expert is patently unreasonable, and that the administrative law judge used the wrong average weekly wage when calculating the amount of benefits to which claimant is entitled. Claimant responds, arguing that the findings of the administrative law judge are supported by substantial evidence.

Employer concedes that it received proper notice of the injury to claimant's left hand and wrist pursuant to Section 12, but argues that it received no notice of the injury to claimant's right hand until the claim for compensation was filed in December 1981. We need not address employer's specific contentions as we hold that claimant's timely notice of injury for the left hand gave employer sufficient notice to enable it to investigate the circumstances surrounding claimant's accident, *see Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983) (Miller, J. dissenting), and that such an investigation would have revealed claimant's complaints regarding her right hand and alerted employer of its possible compensation liability in this regard. Moreover, employer

had knowledge of the problem with and treatment of both hands as evidenced by the March 28, 1980, report of Dr. Almquist to carrier's claims representative. *See* 33 U.S.C. § 912(d) (Supp. III 1986). Accordingly, employer's argument on this issue is rejected, and the administrative law judge's finding of timeliness is affirmed.

Employer next contends that the administrative law judge erred by finding that claimant had suffered a permanent total disability as a result of her work injury. We disagree. The administrative law judge rationally determined that Dr. Almquist's reports indicate that claimant's employment at Todd Pacific Shipyards aggravated and worsened her underlying carpal tunnel syndrome, chronic tendonitis and arthritis, thereby making employer liable for the resulting disability. *See Wheatly v. Alder*, 407 F.2d 307 (D.C. Cir. 1968); *Abbott v. Dillingham Marine and Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom Willamette Iron and Steel Co v. Director, OWCP*, 698 F.2D 1235 (9th Cir. 1982); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164, 169 (1979). Moreover, the administrative law judge's finding that employer failed to establish the existence of suitable alternative employment is supported by substantial evidence.[2] Although employer provided a list of actual job openings physically suitable for claimant, the administrative law judge rationally determined that employer's vocational counselor failed to determine if claimant could realistically compete for and secure these jobs if she diligently tried, given her age and restrictions. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985); *Kimmel v. Sun Shipbuilding and Dry Dock Co.*, 14 BRBS 412 (1981). Accordingly, employer's contentions of error are rejected, and the administrative law judge's finding of permanent total disability is affirmed.

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[2] Employer does not contest the administrative law judge's finding that claimant is unable to perform her usual work because of her hand injuries.

Employer's final contention is that the administrative law judge miscalculated the amount of benefits owed claimant by basing the award on an incorrect average weekly wage. The administrative law judge found that the best evidence of claimant's average weekly wage was the stipulated amount of $519.29. This amount, however, was stipulated as claimant's average weekly wage on August 11, 1980, the time of claimant's alleged back injury. The parties also stipulated that claimant's average weekly wage at the time of her hand injuries, *i.e.*, December 9, 1979, was $259.32. This is the proper weekly wage upon which claimant's award should be based. *See generally Hastings v. Earth Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pertinent part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert denied*, 449 U.S. 905 (1980); 33 U.S.C. § 910. Accordingly, the administrative law judge's award of benefits is modified to reflect an average weekly wage of $259.32.

Accordingly, the administrative law judge's average weekly wage determination is modified in accordance with this opinion. In all other respects, the Decision and Order awarding benefits is affirmed.

SO ORDERED.

s/NANCY S. DOLDER
Administrative Appeals Judge

s/REGINA C. McGRANERY
Administrative Appeals Judge

s/REID C. TAIT
Administrative Law Judge

Dated this 20th
day of April 1988

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARET L. JOHNSON, *Petitioner and Cross-Respondent* v. DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS; TODD PACIFIC SHIPYARDS CORPORATION and AETNA CASUALTY AND SURETY COMPANY, *Respondents and Cross-Petititoners*	Nos. 88-7223 88-7245 OWCP Nos. 14-49748 14-60814 OPINION

Appeal from the Decision and Order of the
Benefits Review Board

Argued and Submitted
November 2, 1989—Seattle, Washington

Filed August 13, 1990

Before: James R. Browning, Mary M. Schroeder and
Betty B. Fletcher, Circuit Judges

Opinion by Judge Schroeder

SUMMARY

Workers' Compensation

Reversing in part and remanding an order of the Benefits Review Board, the court of appeals held that the time of disability rather than the time of the accident should be used to determine the amount of compensation a permanently disabled claimant should receive under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 910.

Appellant Margaret Johnson sought benefits under the LHWCA for injuries sustained in the course of her employment with respondent Todd Pacific Shipyards Corporation. In 1979, while working on a scaler, Johnson fell through an opening in a vessel and injured her hands, wrist, and hip. Johnson worked intermittently after her injury, but experienced continued pain and increased swelling in her hands and was forced to cease work altogether in 1983. The Administrative Law Judge found that Johnson was permanently and totally disabled by the injury and that Todd failed to demonstrate suitable alternative employment for her. The ALJ accepted the average weekly wage of $519.29 as the best estimation of Johnson's earning capacity when she became permanently disabled. The BRB rejected the ALJ's average weekly wage determination on the ground that the ALJ should have calculated the amount of benefits on the basis of her weekly wage at the time of her accident in 1979. Johnson sought review of the BRB's legal determination of how her benefits should be calculated and Todd sought review of the determination that Johnson was permanently and totally disabled.

[1] *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983), strongly supports Johnson's position that the time of disablement rather than the time of the accident defines the point of injury for determining a permanently disabled claimant's average weekly wage under section 910 of the LHWCA.

In that case the court concluded that when a disability due to disease manifests itself, rather than the time when an injured worker is exposed to the disease-causing substance, controls for the purpose of calculating a permanently disabled claimant's average weekly wage. [2] Although *Black* involved an occupational disease, both its rationale and dicta indicate that its holding should apply to the manifestation of latent and unknown injuries as well. [3] The court concluded that the BRB should have approved the ALJ's decision applying the time of the disability rather than the time of accident to measure the amount of compensation under section 910.

[4] The court also concluded that the ALJ's determination that Johnson was in fact disabled as a result of her hand injury is supported by substantial evidence. Todd bore the burden of demonstrating the availability of suitable employment for Johnson and failed to meet this burden.

COUNSEL

Jeffery P. Robinson and Paul W. Whelan, Schroeter, Goldmark & Bender, Seattle, Washington, for the petitioner/cross-respondent.

Russell A. Metz and Charles E. Henshall, Witherspoon, Kelley, Davenport & Toole, Seattle, Washington, for the respondents/cross-petitioners.

OPINION

SCHROEDER, Circuit Judge:

The novel issue in this longshore worker's disability case is whether the victim of a traumatic accident should be compensated at the average weekly wage rate as of the time of the

accident, or as of the subsequent time when the disability attributable to the injury became manifest. We disagree with the Benefits Review Board and agree with the decision of the Administrative Law Judge that the date of the manifestation of the disability controls. Our holding is consistent with other developments in longshore compensation law which recognize that consequences under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, flow from the time that an employer should reasonably be aware of the impairment as opposed to the time of the original accident. *See J.M. Martinac Shipbuilding v. Director, O.W.C.P.*, 900 F.2d 180, 183-84 (9th Cir. 1990); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1287-91 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 401-02 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *see also Bechtel Assocs., P.C. v. Sweeney*, 834 F.2d 1029, 1033 (D.C. Cir. 1987); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141 (5th Cir. 1984); *Stancil v. Massey*, 436 F.2d 274, 278 (D.C. Cir. 1970).

FACTS AND PROCEEDINGS BELOW

Appellant Margaret Johnson sought benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et seq.* (1986), for injuries sustained in the course of her employment with respondent Todd Pacific Shipyards Corporation (Todd). On December 9, 1979 while working as a scaler, Johnson fell through an opening in a vessel and injured her hands, wrist and hip. Johnson worked intermittently after her injury but experienced continued pain and increased swelling in her hands until she had to cease work altogether on May 23, 1983.

The Administrative Law Judge (ALJ) found that Johnson's hand injury arose in the course of her employment, that Johnson was permanently and totally disabled by the injury, and that Todd failed to demonstrate suitable alternative employment for her. The ALJ accepted the average weekly wage

of $519.29 as the best estimation of Johnson's earning capacity when she became permanently disabled.

The Benefits Review Board (BRB) upheld the ALJ's finding that Johnson had suffered permanent total disability as a result of her hand injury. The BRB, however, rejected the ALJ's average weekly wage determination on the ground that the ALJ should have calculated the amount of benefits owed to Johnson on the basis of her average weekly wage at the time of her accident in December 1979, rather than on the basis of the best estimate of her average weekly wage at the time of her permanent disability in 1983. Johnson seeks review of the BRB's legal determination that the time of the accident controlled the calculation of her average weekly wage. Todd seeks review of the BRB's determination that Johnson was permanently and totally disabled as a result of her hand injury.

DISCUSSION

The LHWCA provides that injured employees shall receive compensation for permanent total disabilities based on a percentage of their "average weekly wages." 33 U.S.C. § 908(a). Under section 910, the average weekly wage for disability compensation is based upon the injured employee's average weekly wage "at the time of the injury." The unusual feature of this case is that the claimant's injury, although due to a traumatic episode, was not evident until a few years later. The novel issue presented here is therefore whether "injury" under the statute means injury as of the time of the accident or injury as of the time when the disability attributable to the injury becomes manifest.

[1] *Todd Shipyards Corp. v. Black*, 717 F.2d at 1287-91, strongly supports Johnson's position that the time of disablement rather than the time of the accident defines the point of injury for determining a permanently disabled claimant's average weekly wage under 33 U.S.C. § 910. In that asbestosis

case we confronted the question of whether the time of injury in the case of an occupational disease refers to the time when a disability due to disease manifests itself or to the time when an injured worker is exposed to the disease-causing substance. We concluded that the former date controls for the purpose of calculating a permanently disabled claimant's average weekly wage under the LHWCA. *Id.* at 1291.

Todd argues that the time of the accident constitutes the time of injury under section 910, even though the full effect of the accident remains unknown until much later. Todd relies on our language in *Black* where we stated, "[i]n most cases of traumatic injury, the time of injury will coincide almost exactly with the time the worker is disabled." *Id.* at 1288. Rather than establishing that the time of trauma defines the time of disablement for purposes of section 910, however, this language in *Black* simply foreshadows the problem that would arise in exceptional cases, like the one at bar, where the onset of the disability occurs years after the initial trauma.

Congress has now amended the LHWCA to codify our *Black* decision, providing that "with respect to a claim for compensation for . . . disability due to an occupational disease which does not immediately result in . . . disability, the time of injury shall be deemed to be the date on which the employee . . . becomes aware . . . of the relationship between the employment, the disease, and the . . . disability." 33 U.S.C. § 910 (i)(1988), *as amended by* Act of Sept. 28, 1984, Pub. L. No. 98-426, § 10, 98 Stat. 1647.

[2] Although *Black* involved an occupational disease, both its rationale and dicta indicate that its holding should apply to the manifestation of latent and unknown injuries as well. *Black* did not distinguish between occupational disease and occupational injury but rather treated both terms similarly. 717 F.2d at 1291. By the same token, we have rejected employers' arguments that "traumatic injuries" should be treated differently from "latent injuries" or "occupational diseases"

for purposes of the LHWCA's statute of limitations provision, 33 U.S.C. § 913(a). *Todd Shipyards Corp. v. Allan*, 666 F.2d at 401. As Judge Learned Hand aptly observed, the LHWCA is "not concerned with pathology, but with industry disability; and a disease is no disease until it manifests itself . . . [A]n infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs." *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.), *cert. denied*, 308 U.S. 570 (1939), *quoted in Black*, 717 F.2d at 1290. Here, Johnson did not "succumb" until her hands were so inflamed that she could no longer work.

We have interpreted the word injury to mean the date of disability rather than the time of the accident when interpreting other sections of the LHWCA. In *Allan*, for example, we held that a claimant is not injured under the LHWCA's statute of limitations provision, 33 U.S.C. § 913(a), "until 'he [becomes] aware of the full character, extent, and impact of the harm done to him.' " 666 F.2d at 401 (quoting and affirming decision of the BRB)(emphasis omitted); *accord Martinac*, 900 F.2d at 183-84; *Marathon Oil Co.*, 733 F.2d at 1141. In *Martinac* we rejected an employer's argument that the LHWCA's statute of limitations period was triggered at the point of a claimant's accident, holding instead that even where a claimant suffered temporary disability, the period did not begin to run until a claimant learned that he or she was permanently disabled.

In *Stancil v. Massey*, the D.C. Circuit discussed the terms, "injury," "disability," and "accident," as used in the LHWCA. 436 F.2d at 276, *relied upon in Martinac*, 900 F.2d at 184, and *Allan*, 666 F.2d at 401. The D.C. Circuit noted that Congress in the LHWCA's statute of limitations provisions, as in the permanent disability wage calculation provision, used the word "injury" as opposed to "accident." *Id.* The court observed that "accident" refers to the event causing the harm, while "injury" refers "to the harmful physical . . . consequences of

that event which need not occur or become obvious simultaneously with the event." *Id.* The court concluded that Congress did not intend to tie injury to the fixed point of the accident. Rather, injury "should encompass physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed, such as an occupational disease or a latent wound." *Id.* at 277. The court found that once a person has been "put on the alert . . . as to the likely impairment of his earning power, there is an 'injury'; before that time, while there may have been an accident, there is as yet no 'injury' . . ." *Id.* The principles of *Allan*, *Martinac* and *Stancil* support the conclusion that in December 1979 Johnson suffered an "accident," but was not "injured" until 1983 when the continued strain on her previous hand impairment rendered her permanently disabled.

This interpretation also serves the purpose of section 910. This section compensates a worker for a loss of future earning capacity rather than for loss of past earning capacity. *See Black*, 717 F.2d at 1289. Use of Johnson's accident date as the basis for recovery would thwart that purpose by providing compensation on the basis of a past wage rate for a disability that occurred years later. Moreover, were we to hold that benefits should be based on wages at the time of a potentially disabling accident, we would discourage workers like Johnson from attempting to return to work. This is because it would be to the claimant's advantage to file a claim of disability as soon as possible in order to begin receiving benefits at that level sooner rather than later. As we observed in *Martinac*, the purposes underlying the statute are served by "not discouraging workers' attempts to return to work and by not encouraging premature claims of permanent disability." 900 F.2d at 184.

[3] For all of these reasons, we conclude that the Board should have approved the Administrative Law Judge's decision applying the time of the disability rather than the time

of the accident to measure the amount of compensation under section 910.

[4] The only remaining issue is whether the ALJ's determination that Johnson was in fact disabled as a result of her hand injury is supported by substantial evidence. As to this issue Todd has filed a cross-petition. Under *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980), Todd bore the burden of demonstrating the availability of suitable employment for Johnson. *Id.* at 1329. It failed to meet this burden. None of the potential employers proffered by Todd stated that they would consider employing a person with Johnson's deficiences. A rehabilitation counselor testified that there was no job in the competitive labor market which Johnson could engage in. Todd argues that the ALJ should have relied on the testimony of its vocational expert who stated that Johnson did not desire to work. The ALJ, however, did not find that evidence credible. As a general rule, we will not disturb an ALJ's assessment of a witness' credibility. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 1081 (9th Cir. 1988)(*citing Dorris v. Director, OWCP*, 808 F.2d 1362, 1364 (9th Cir. 1987)). The record, therefore, supports the finding that Johnson suffered permanent disability as a result of her hand injury.

The order of the Benefits Review Board is REVERSED IN PART AND REMANDED. Costs are awarded to Johnson.

APPENDIX D

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARET L. JOHNSON
Petitioner and
Cross-Respondent

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS; TODD PACIFIC SHIPYARDS CORPORATION and AETNA CASUALTY & SURETY COMPANY
Respondents and
Cross-Petititoners

Nos. 88-7223/7245

OWCP NOS. 14-49748
14-60814

FILED
OCT 17 1980
CLERK,
U.S. COURT OF APPEALS

RECEIVED
OCT 22 1990
WITHERSPOON, KELLEY
DAVENPORT & TOOLE, P.S.

ORDER

Before: BROWNING, SCHROEDER and FLETCHER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc*.

The full court has been advised of the suggestion for rehearing *en banc* and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing *en banc* is rejected.

APPENDIX E

33 U.S.C. § 919

PROCEDURE IN RESPECT OF CLAIMS

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.

(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee.

(g) At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

33 U.S.C. § 910

DETERMINATION OF PAY

SEC. 10. (a) Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or

other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d)*(1)* The average weekly wages of an employee shall be one-fifty second part of his average annual earnings.

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i)) occurs—

(A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or

(B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 6(b)) applicable at the time of the injury.

(e) If it be established that the injured employee was a minor when injured and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of—

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage,

as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

(g) The weekly compensation after adjustment under subsection (f) shall be fixed at the nearest dollar. No adjustment of less than $1 shall be made, but in no event shall compensation for death benefits be reduced.

(h) (1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national ave age weekly wage determined under Section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date, except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability, at less than the maximum rate that was provided in this Act at the time of the injury which resulted .n the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as

he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 5 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date.

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

5 U.S.C. § 554

Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [an] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 384; Mar. 27, 1978, P. L. 95-251, § 2(a)(1), 92 Stat. 183.)

5 U.S.C. § 557

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall intiially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearing pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision, or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity

to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tenative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or

knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case

the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 387; Sept. 13, 1976, P. L. 94-409, § 4(a), 90 Stat. 1246.)

APPENDIX F

OFFICIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

DOCKET No. 83-LHC-3224
82-LHC-3225 [*sic*]

[OWCP] Nos. 14-49748
14-60814

In the Matter of MARGARET L. JOHNSON

vs.

TODD PACIFIC SHIPYARDS *et al*

Place: Seattle, Washington
Date: January 24, 1984

Pages 1-75

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U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: MARGARET L. JOHNSON Claimant, v. TODD PACIFIC SHIPYARDS CORP. Employer and AETNA CASUALTY & SURETY CO. Carrier	Cases Nos. 83-LHC-3224 83-LHC-3225

Room 3086
Henry M. Jackson Federal Building
915 Second Avenue
Seattle, Washington
Tuesday, January 24, 1984

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 o'clock a.m.

BEFORE:

HENRY B. LASKY
Administrative Law Judge

APPEARANCES:

For the Claimant:

PAUL W. WHELAN, Esq.
Schroeter, Goldmark & Bender
540 Central Building
Seattle, WA 98104

For the Employer:

RUSSEL [*sic*] A METZ, Esq.
Witherspoon, Kelley, Davenport & Toole, P.S.
1111 Third Avenue Building
Seattle, WA 98101

CONTENTS

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Margaret L. Johnson	27	58	—	—

EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
CLAIMANT'S		
1 through 17	8	8
EMPLOYER'S		
A through N	11	11

PROCEEDINGS

9:00 a.m.

JUDGE LASKY: Let us proceed in the matter of Margaret L. Johnson versus Todd Pacific Shipyards and Aetna Casualty & Surety Company. It is two cases Numbers 83-LHCA-3224 and 3225 from the OWCP Numbers, respectively, 14-49748 and 14-60814.

Let the record reflect my name is Henry B. Lasky. I am the Administrative Law Judge assigned to hear this proceedings. Will counsel state their appearance for the record.

MR. WHELAN: For the Claimant, Paul W. Whelan of the Seattle law firm of Schroeter, Goldmark & Bender.

MR. METZ: For the Employer and Carrier, Russell A. Metz of Witherspoon, Kelley, Davenport and Toole.

JUDGE LASKY: Thank you very much.

The record should further reflect that this hearing is being held pursuant to a Notice of Calendar Call issued on November 18, 1983. The Calendar Call was held yesterday on January 23rd at which time this case was scheduled for this morning.

I have had the opportunity of meeting with counsel in my office before going on the record and certain stipulations were entered into with respect to each of the two claims and what I will do now is recite these stipulations into the record and if I have made a mistake, I am sure you will call it to my attention.

But as I understand it, gentlemen, with respect to both cases there is no dispute that the parties were subject to the provisions of the Act; that the Claimant and the Employer were in an employee-employer relationship at all relevant

times and that the alleged injury in Case No. 83-LHC-3224 occurred on December 9, 1979, and with respect to 83-LHC-3225, the alleged injury is August 11, 1980.

It is further stipulated that the Claimant filed a claim for compensation in both cases on December 2, 1981. That in Case No. 83-LHC-3224 the Employer filed a notice of controversion on January 21, 1983. In Case No. 83-LHC-3225 notice of controversion was filed on January 13, 1982.

In Case No. 3224 the Employer filed a first report of accident on December 12, 1979. In Case No. 3225 the first report of accident was filed by the Employer on November 10, 1980.

With respect to Claimant's average weekly wage it is further stipulated in Case No. 3224 allegedly occurring on December 9, 1979, the Claimant's average weekly wage was $259.32, which would yield an appropriate compensation rate of $172.80.

In Case No. 3225, which allegedly occurred on August 11, 1980, the Claimant's average weekly wage was $519.29 which would yield an appropriate compensation rate of $342.73.

It is further stipulated that the Employer voluntarily paid compensation to the Claimant in Case No. 3224 during the period of December 10, 1979, through December 16, 1979, and again from February 25, 1980 through June 1 of 1980, and again from November 4, 1980 through September 8, 1983, in the total amount of $17,586.00.

In Case No. 3225 the Employer voluntarily paid compensation benefits from November 7, 1980 through July 20, 1981 in the total amount of $12,085.40.

It is further stipulated that the Carrier has paid for medical services under Section 7.

It is also stipulated that the Claimant has not now returned to her regular employment and that she was last employed on May 19, 1983.

Is that a fair recitation of the matters which have been stipulated to?

MR. WHELAN: Yes, Your Honor.

MR. METZ: Yes, Your Honor.

JUDGE LASKY: In view of the stipulations the following issues are in dispute and require resolution by me and they are as follows:

The duration of temporary total disability, the nature and extent of Claimant's alleged permanent partial disability. I take it your Claimant claimed a partial and not a permanent total?

MR. WHELAN: Permanent total.

JUDGE LASKY: The nature and extent of the Claimant's permanent total disability and whether or not the injuries arose out of and were incurred in the course of Claimant's employment. And number four, whether or not the Claimant is barred as a result of the statute of limitations as contained in Sections 12 adn [*sic*] 13 of the Act. And number five, whether or not there is a penalty due under Section 14E of the Act, and, number six, whether or not Section 8F of the Act applies as claimed by the Employer, and, of course, there is the contingent issue of fees and costs in the event the Claimant prevails. There's a total of potentially seven issues requiring resolution by me. Is that a fair recitation of the issues requiring resolution?

MR. WHELAN: It is.

MR. METZ: Yes, Your Honor.

JUDGE LASKY: Okay. Opening statements?

No. 90-1157

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IN THE

Supreme Court of the United States

October Term, 1990

TODD PACIFIC SHIPYARDS CORPORATION

and

AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

MARGARET L. JOHNSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
CERTIORARI SHOULD NOT BE GRANTED . .	2
A. **The Opinion Below Was Correct**	3
CONCLUSION	20

TABLE OF AUTHORITIES

CASES **Page**

Todd Shipyard Corp. v. Allen, 666 F.2d 399 (9th Cir.), cert. denied, 459 U.S. 1034 (1987) 7, 12-15

Avendale Shipyards, Inc. v. Kennel, 914 F.2d 88 (5th Cir. 1990) 16

Banner v. Nat. Steel & Shipbuilding Co., 5 B.R.B.S. 290 (1970), aff'd in pertinent part, 600 F.2d 1288 (9th Cir. 1979) 5

Barker v. Tri-State Terminals, Inc., 3 B.R.B.S. 244 (1976) 6

Bath Iron Works Corp. v. Galin, 605 F.2d 583 (1st Cir. 1979) 14

Betts v. Arthur Snowden Co., 14 B.R.B.S. 805 (1982) 19

Chiarella v. Bethlehem Steel Corp., 13 B.R.B.S. 91 (1981) 7

Del Vacchio v. Sun Ship Building & Drydock Co., 16 B.R.B.S. 190 (1984) . 7

Holcomb v. Robert W. Kirk & Assoc., Inc., 655 F.2d 589 (5th Cir.) cert. denied, 459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1981) 16

Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088 (5th Cir. 1990) 11, 15, 16

TABLE OF AUTHORITIES, continued

CASES **Page**

J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180 (9th Cir. 1990) 13, 14

Marales v. General Dynamics Corp., 769 F.2d 66 (2d Cir. 1985) 14

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 85 S. Ct. 1012, 13 L. Ed. 2d 895, (1965) 2, 3, 19

Pillsbury v. United Engineering Co., 342 U.S. 197 (1952) 11

Rubin v. United States of America, 449 U.S. 424 (1981) 16

Saif Corp./Oregon Ship v. Johnson, 908 F.2d 1434 (9th Cir. 1990) 2

Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970) 13, 14

Stevensen v. Linens of the Week, 688 F.2d 93, 223 U.S. App. D.C. I (1982) 16

Todd Shipyards Corporation v. Black, 717 F.2d 1280 (1983) , cert. denied, 466 U.S. 937 (1983) 2, 7, 9, 10, 14, 15

Tri-State Terminals, Inc. v. Jessi, 596 F.2d 752 (7th Cir. 1979) 6

TABLE OF AUTHORITIES, continued

CASES **Page**

United States Dept. of Labor v. Pirini North River Assoc., 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983) 16

STATUTES AND OTHER AUTHORITIES

5 U.S.C. § 554 3

5 U.S.C. § 557(c) 3, 17

5 U.S.C. § 1001 19

33 U.S.C. § 902(2) 2, 4, 6

33 U.S.C. § 902(10) 8

33 U.S.C. § 908 12

33 U.S.C. § 908(a) 2

33 U.S.C. § 910 . . . . . 2, 5, 20

33 U.S.C. § 910(a) 6

33 U.S.C. § 910(b) 6

33 U.S.C. § 910(c) 6

33 U.S.C. § 910(i) 4, 5

STATEMENT OF THE CASE

Respondent adopts the Administrative Law Judge's (hereinafter ALJ) recitation of the facts. (Appendix A, Brief of Petitioner.) That record established the following facts. In December, 1979, while working as a shipscaler at Todd Shipyard, Respondent Johnson fell, injuring her hands. At that time her pre-injury wage was stipulated to be $259.32. She returned to intermittent work until she underwent bilateral carpal tunnel surgery. The physical impairment of her hands was subsequently determined to be 20% by her surgeon. Respondent returned to work, sometimes intermittently, until she injured her back at Todd Shipyard in August, 1980. As to that date, her pre-injury wage was stipulated to be $519.29. Following treatment for her back, Respondent again returned to work, sometimes intermittently, until May, 1983, the date ALJ found her to

be totally disabled on the basis of "tendinitis and arthritis which affects her hands."

CERTIORARI SHOULD NOT BE GRANTED

The pertinent language of the Longshore Act, 33 U.S.C. § 910, § 902(2), § 908(a), is unambiguous. The decision of the Court of Appeals is well within the clear language of the Act and its interpretation by the courts. See, e.g., Saif Corp./Oregon Ship v. Johnson, 908 F.2d 1434 (9th Cir. 1990); Todd Shipyards Corporation v. Black, 717 F.2d 1280, cert. denied, 466 U.S. 937 (1983).

The decision of the ALJ to apply the average weekly wage closest to the 1983 manifestation of Respondent's permanent total disability is supported by the record. Evaluation of evidence is within the appropriate discretion of the ALJ O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 362, 85 S. Ct. 1012, 13

L. Ed. 2d 895 (1965). Both parties stipulated to a 1980 average weekly wage. The fact that the amount of that wage was given in relation to another on the job injury is inconsequential. The stipulated amount is the appropriate basis for the calculation of her compensation rate for permanent total disability.

The ALJ explanation of the basis for his decision is in compliance with the Administrative Procedure Act (5 U.S.C. §§ 554, 557(c)). See, O'Keeffe, supra, at 362.

A. **The Opinion Below Was Correct.**

The opinions of the Court of Appeals and the ALJ are rooted in well-established case law interpretations of the Longshore and Harbor Workers Compensation Act (LHWCA). The Ninth Circuit appropriately reviewed only the legal questions ruled on by the Benefits Review Board (BRB).

1. The opinion below correctly construed the Act.

The Ninth Circuit Court of Appeals is correct in its reading of the Act. Respondent claims that the court correctly interpreted the Act in light of the definition provided in § 902(2), which defines injury as:

> [a]ccidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury.

(Emphasis added.)

Petitioner on the other hand focuses on the allegedly inappropriate interpretation of § 910(i). Nothing in the Court of Appeal's opinion or in the opinion of the ALJ indicates that § 910(i) was used to determine the compensation rate in this case. The ALJ decision was rendered in July, 1984, two months before § 910(i) became law. Furthermore, § 910(i) does not

apply to the instant case. The 1984 Amendments to the Act addressed the inequities of occupational disease victims such as asbestos workers whose exposure did not result in impairment until decades later. The issue in such cases is whether to apply the wage rate as of the date of exposure or the wage rate at the date of manifestation. See, e.g., Aduddell Owens-Corning Fiberglas, 16 B.R.B.S. 131 (1984). Congress resolved those issues in 1984. See, e.g., § 910(d)(2) and (i). They have nothing, however, to do with Respondent Margaret Johnson's case. Respondent had a physical injury followed directly by the occupational diseases of traumatic tendinitis and arthritis.

The Longshore Act, 33 U.S.C. § 910, provides for three alternative methods for computing the appropriate compensation rate. The ALJ has broad discretion (Banner v. Nat. Steel & Shipbuilding Co., 5 B.R.B.S. 290

(1970), aff'd in pertinent part, 600 F.2d 1288 (9th Cir. 1979)) to reach a fair and reasonable approximation of a claimant's wage-earning capacity (Barker v. Tri-State Terminals, Inc., 3 B.R.B.S. 244 (1976), aff'd sub. num., Tri-State Terminals, Inc. v. Jessi, 596 F.2d 752 (7th Cir. 1979)).

The scheme of the LHWCA provided the ALJ with the discretion to award compensation to Ms. Johnson, in its definitions § 902(2) and in the alternative methods of calculation in § 910(a), (b) and (c). The ALJ applied the clear language of these sections in making the determination of Ms. Johnson's compensation.

As can be seen, the court below did not rely upon the inapplicable 1984 amendments, but, rather, applied its own previous interpretations of the Act (see, e.g., Todd Shipyard Corp. v. Allen, 666 F.2d 399 (9th Cir.), cert. denied, 459 U.S. 1034 (1987);

Todd Shipyard Corp. v. Black, supra) in deciding this case.

The language of the Act is not ambiguous and the Board as well as the courts have so held. See, Del Vacchio v. Sun Ship Building & Drydock Co., 16 B.R.B.S. 190, 193 (1984).

Petitioner cites Del Vacchio, supra, for the proposition that payments are based on an average weekly wage rate at the time of injury for which compensation is claimed. However, "a work related aggravation of a pre-existing injury is compensable in itself under the Act and is considered a new injury." Del Vacchio at 193, citing Chiarella v. Bethlehem Steel Corp., 13 B.R.B.S. 91 (1981). Therefore, "average weekly wage in aggravation cases must be based on the claimant's earnings at the time of the aggravation." Del Vacchio, at 193. Based on this reasoning, the Board in Del Vacchio reversed and awarded compensation

based on wages at the time of the aggravation of the injury, thus using 1978 wages rather than 1973 wages. Id. at 193.

The Ninth Circuit decision in the instant case noted that the LHWCA compensates occupational disability, not physical injury. (Appendix C-7, Brief of Petitioner.) Section 902(10) defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The court noted that "[w]e have interpreted the word injury to mean the date of disability rather than the time of the accident . . ." (Appendix C-7, Brief of Petitioner.)

In 1979, Respondent Johnson suffered hand injuries that eventually required surgery. The following year Respondent suffered a back injury. Between 1980 and 1983, Respondent worked only sporadically as a result of both the back injury and the

carpal tunnel syndrome. By May of 1983, however, Respondent was unable to continue her employment as a ship scaler because of the work related aggravation of the arthritis and tendinitis in her hands. Whether the arthritis and tendinitis are an "occupational disease" or the result of an "injury" is essentially irrelevant under the Act. The outcome is the same. Respondent is permanently unable to engage in reasonably continuous employment, and is, hence, totally and permanently disabled.

Contrary to Petitioner's assertion, it was unnecessary for the Ninth Circuit to expand the language of the Longshore Act to determine the correct compensation rate. Rather, it could apply the broad language of the Act to one of the situations contemplated by the statutory framework. The court below relied upon Todd Shipyards Corp. v. Black, supra, to draw an analogy

between latent injuries and occupational disease:

> Although Black involved an occupational disease, both its rationale and dicta indicate that its holding should apply to the manifestation of latent and unknown injuries as well. Black did not distinguish between occupational disease and occupational injury, but rather treated both terms similarly.

Ninth Circuit Opinion. (Appendix C-6, Brief of Petitioner.)

Whether a compensable total disability stems from an injury and its sequelae or from a traumatic injury followed by a disease process, the compensation rate may properly be based upon the date of disability, rather than the date of the accident or the date of occupational exposure.

2. The opinion below is well within the established case law.

The Court of Appeals correctly applied the Act in determining Respondent's compensation rate. Since the issue was

clear, the court found it unnecessary to indulge in the fanciful statutory construction suggested by Petitioner.

Petitioner cites Pillsbury v. United Engineering Co., 342 U.S. 197, 199-201 (1952) and Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 1094 (5th Cir. 1990) for the proposition that inequitable results may not be avoided by an improper construction of the Longshore Act. In the instant case, the Ninth Circuit did avoid an inequitable result, but by following the plain language of the statute. Furthermore, Pillsbury, supra, is factually distinguishable. In Pillsbury, the claimant's injury was "patent," not "latent." Both terms are clearly defined in the Act. Obviously, to have misapplied a well defined term of art would have changed the intent of Congress. The opposite is true here. Congress established three distinct categories for which compensation

could be awarded -- traumatic injury, disease resulting from injury, and late manifesting occupational disease.

In the case of disability resulting from physical injury the compensation rate can, but need not always, be based upon the pre-injury wage. This is only logical. An injury is a necessary cause for economic disability but such disability is not a necessary outcome of an injury. Congress contemplated this by establishing a compensation scheme based upon the loss of wage-earning capacity rather than mere physical impairment. See, 33 U.S.C. § 908.

Petitioner chooses to ignore the court's reasoning. Determining the date on which compensation should be based, the Ninth Circuit very clearly interpreted the word "injury" to mean the date of disability, citing Todd Shipyards Corp. v. Allen, 666 F.2d 399, 401-02 (9th Cir. 1982), cert. denied, 459 U.S. 1034 (1982). In

Allen the statute of limitations was deemed to begin to run when the claimant became aware of the full character of his harm. (Appendix C-7, Brief of Petitioner.)

The court below also cited J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 183-84 (9th Cir. 1990) for the proposition that the word injury means the date of disability. The employer in Martinac argued that the statute of limitations was triggered at the point of claimant's accident. The court held that even where a claimant suffered temporary disability, the statute did not begin to run until the claimant learned his disability was permanent. Martinac, supra. (Appendix C-7, Brief of Petitioner.)

Finally, the Ninth Circuit cited Stancil v. Massey, 436 F.2d 274, 278 (D.C. Cir. 1970). The D.C. Circuit distinguished the terms "injury," "disability" and "accident." The Ninth Circuit adopted the

reasoning of Stancil to the effect that Congress:

> [d]id not intend to tie injury to the fixed point of the accident. Rather, injury "should encompass physical harm of a kind which is unknown to the employee at the time of the accident, but which is later revealed, such as an occupational disease or a latent wound."

(Emphasis added.) (Appendix C-8, Brief of Petitioner.)

The Ninth Circuit concluded that Respondent Johnson suffered an injury to her hands in 1979, but was not "injured" in the sense of permanent economic disability until 1983, when she could no longer work. That holding is in line with the accepted interpretation of the statute followed by the Ninth Circuit in previous decisions (Todd Shipyards v. Black, supra; Todd Shipyards v. Allen, supra; Martinac, supra) and by other circuit courts. Stancil v. Massey, supra; Marales v. General Dynamics Corp., 769 F.2d 66 (2d Cir. 1985); Bath Iron

Works Corp. v. Galin, 605 F.2d 583 (1st Cir. 1979). In addition, this Court has denied certiorari in cases where these terms and this statute was involved. Todd Shipyards Corp. v. Allen, supra, cert. denied, 459 U.S. 1034 (1987); Todd Shipyards Corp. v. Black, supra, cert. denied, 466 U.S. 937 (1983).

The logic of the Ninth Circuit's opinion is unassailable, to wit:

> [w]ere we to hold that benefits should be based on wages at the time of a potentially disabling accident, we would discourage workers like Johnson from attempting to return to work.

(Appendix C-8, Brief of Petitioner.) As is evident from the record, Respondent Johnson did indeed continue to work in spite of her injuries until March 1983 when she no longer could perform her job.

Petitioner compares the instant case with Ingalls, supra. However, Ingalls is distinguishable because Mr. Ingalls was already retired. In 1984, Congress

established a different scheme for retirees (§ 910(d)(2)), and the petitioner in Ingalls sought an interpretation of the statute which was inconsistent with that scheme.

Finally, Petitioner cites Rubin v. United States of America, 449 U.S. 424, 430 (1981) for the proposition that when the terms of a statute are unambiguous, judicial inquiry ends. We agree. However, Petitioner urges ambiguity where none exists. Indeed, the Act was intended by Congress to be given a broad and liberal interpretation. United States Dept. of Labor v. Pirini North River Assoc., 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983); Avendale Shipyards, Inc. v. Kennel, 914 F.2d 88 (5th Cir. 1990); Stevensen v. Linens of the Week, 688 F.2d 93, 223 U.S. App. D.C. I (1982); Holcomb v. Robert W. Kirk & Assoc., Inc., 655 F.2d 589 (5th Cir. 1981), cert. denied, 459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1981).

Petitioner seeks a narrow interpretation which conflicts with the congressional intent to compensate future wage loss based upon a fair assessment of actual wages or wage-earning capacity.

3. The decision below is supported by the evidence -- the requirements of the Administrative Procedure Act were satisfied.

Petitioner is correct in asserting that 5 U.S.C. § 557(c) requires the ALJ to give reasons for the basis of his findings and conclusions. In the instant case, the ALJ did state which factors he considered important. In determining the amount of claimant's average weekly wage, he relied on the best evidence available to him.

The most recent weekly wage to which both parties stipulated was $519.29 as of August 11, 1980. Furthermore, both parties stipulated the claimant was last employed May 19, 1983. There were no disputes between the parties as to the sporadic work

record in the intervening period of time from August 1980 to May 1983.

Petitioner reads the ALJ's paragraph on determination of average weekly wages as if it had no context. The ALJ's determination comes after a complete discussion and evaluation of the evidence and concludes that the best evidence available leads to the determination of wages. To construe the decision otherwise would be to take the paragraph on wages completely out of its logical context within the decision.

Petitioner contends that the stipulations regarding average weekly wages were specific with respect to the date of injury, type of injury and dollar amount. While it is true that the stipulations were specific, it is irrelevant. The fact that both parties stipulated to the quantum of weekly wages indicates that there is no dispute as to those amounts. The ALJ used the stipulations to ascertain the best

evidence of Respondent's wage-earning capacity.

Petitioner cites Betts v. Arthur Snowden Co., 14 B.R.B.S. 805 (1982) for the proposition that an ALJ is not obligated to accept all stipulations but must adequately explain a rejection or modification of any such stipulation. Betts does not address the issue of an ALJ accepting stipulations. Rather, it addresses the issue of resolving conflicting evidence by the use of the "resolving doubts rule." Here there was no conflicting evidence.

In O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 362, 85 S. Ct. 1012, 13 L. Ed. 2d 895 (1965), this Court stated that:

> [i]n cases decided both before and after the passage of the Administrative Procedure Act, 5 U.S.C. § 1001, et seq. (1958 ed.), the Court has held that the foregoing statutory provisions limit the scope of judicial review of the Deputy Commissioner's determination that a "particular injury arose out of and in the course

> of employment" . . . It matters not that basic facts are disputed . . . the fact that the inference . . . involves an application of a statutory term or phrase to a specific set of facts, gives rise to no greater scope of judicial review.

This Court thus concluded that judicial review is not appropriate in cases such as the instant case, unless the inferences drawn are "irrational" or "unsupported by substantial evidence on the record . . . as a whole." Id.

The Ninth Circuit correctly analyzed § 910 as proving compensation for loss of future earnings and correctly concluded that compensation based on wages as of the date of the earlier physical injury would be both unjust and inconsistent with the Act.

CONCLUSION

The Ninth Circuit Court of Appeals and the ALJ correctly applied the law to the facts of this case. The ALJ complied with the requirements of the Administrative

Procedures Act. Hence, the opinion below should stand.

RESPECTFULLY SUBMITTED this 11th day of February, 1991.

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TODD PACIFIC SHIPYARDS CORPORATION, ET AL., PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "time of injury" used to calculate a disability claimant's average weekly wage under Section 10 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 910, is the time of a traumatic accident or the subsequent time when the disability attributable to the accident becomes fully manifest.

2. Whether the administrative law judge's calculation of claimant's average weekly wage is adequately explained and supported by the record.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Director, OWCP (Morales) v. *General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985) 6, 11, 12
J.M. Martinac Shipbuilding v. *Director, OWCP*, 900 F.2d 180 (9th Cir. 1990) 11
Marathon Oil Co. v. *Lunsford*, 733 F.2d 1139 (5th Cir. 1984) 11
National Steel & Shipbuilding Co. v. *Bonner*, 600 F.2d 1288 (9th Cir. 1979) 13
O'Keeffe v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) 14
Stancil v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970) 5, 6, 11
Todd Shipyard Corp. v. *Allan*, 666 F.2d 399 (9th Cir.), cert. denied, 459 U.S. 1034 (1982) 11
Todd Shipyards Corp. v. *Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984) 5, 11
Walker v. *WMATA*, 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987) 13

Statutes:

Act of Sept. 28, 1984, Pub. L. No. 98-426, 98 Stat. 1639:
§ 10(a)(2), 98 Stat. 1647 (33 U.S.C. 910(i)) 7
§ 28(a), 98 Stat. 1654 (33 U.S.C. 901 note) 7
Administrative Procedure Act, 5 U.S.C. 557(c) 12
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 3
§ 2(2), 33 U.S.C. 902(2) 8
§ 2(10), 33 U.S.C. 902(10) 7

Statutes—Continued: Page

§ 8, 33 U.S.C. 908 7
§ 10, 33 U.S.C. 910 ..... 4, 5, 6, 7, 11
§ 10(a), 33 U.S.C. 910(a) 13
§ 10(b), 33 U.S.C. 910(b) 13
§ 10(c), 33 U.S.C. 910(c) 13, 14
§ 10(i), 33 U.S.C. 910(i) 5, 7, 9, 10, 12
§ 13(a), 33 U.S.C. 913(a) 5, 11
§ 22, 33 U.S.C. 922 14

Miscellaneous:

H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1 (1983) 9
H.R. Rep. No. 1027, 98th Cong., 2d Sess. (1984) .. 9
R. Sloane, *Sloane-Dorland Annotated Medical-Legal Dictionary* (1987) 2
War Manpower Comm'n United States Employment Service, *Industrial Manning Table for Shipbuilding* (1942) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C9) is reported at 911 F.2d 247; its order denying rehearing (Pet. App. D1) is unreported. The decisions of the administrative law judge (Pet. App. A1-A18) and the Benefits Review Board (Pet. App. B1-B6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. A petition for rehearing was denied on October 17, 1990 (Pet. App. D1). The

petition for a writ of certiorari was filed on January 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Todd Pacific Shipyards Corporation employed respondent Margaret L. Johnson as a ship "scaler" from June 17, 1979, until May 23, 1983.[1] Pet. App. A5, A7. Respondent suffered from pain and swelling in her hands both before and during her employment with Todd. Pet. App. A4-A8. On December 9, 1979, while on the job, she fell through a hole in the floor and injured her left arm and leg. Pet. App. A5, A7. After undergoing bilateral carpal tunnel release surgery[2] on her hands in early 1980, respondent strained her back on August 11, 1980. Pet. App. A5, A11. She again underwent surgery on her right thumb in 1981. Pet. App. A6. In 1982, two doctors evaluated her as having a 20% permanent impairment of function of her hands. Pet. App. A6-A7. Because of her medical problems, respondent's work was intermittent during most of the period from her 1979 hand injury until she stopped working completely in 1983. Pet. App. A5-A7.

On December 2, 1981, respondent filed compensation claims under the Longshore and Harbor Work-

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[1] A ship scaler is one who operates equipment "to loosen old paint and rust from metal surfaces of a ship to prepare the metal surfaces for repainting." War Manpower Comm'n, United States Employment Service, *Industrial Manning Table for Shipbuilding* 281 (1942).

[2] Carpal tunnel syndrome is a complex of symptoms resulting from compression of a nerve in the carpal tunnel, or lower arm and wrist. Carpal tunnel release surgery is designed to relieve pressure in the carpal tunnel. R. Sloane, *Sloane-Dorland Annotated Medical-Legal Dictionary* 689 (1987).

ers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, for both the 1979 fall and the 1980 back strain. Pet. App. A10. At a hearing before an administrative law judge, the parties stipulated that claimant's average weekly wage as of December 9, 1979 was $259.32, yielding a compensation rate of $172.80 per week; and that her average weekly wage as of August 11, 1980, was $519.19, yielding a compensation rate of $342.73. Pet. App. A2. Apparently neither party introduced evidence concerning her wages after August 11, 1980.

2. After reviewing the medical and vocational evidence, the ALJ concluded that respondent was permanently and totally disabled by tendonitis and arthritis in her hands. Pet. App. A15.[3] Finding that she also "suffered from bilateral carpal tunnel syndrome which, to a reasonable medical certainty was caused by both the fall and by merely using the hands on the job," the ALJ held petitioners responsible for the bilateral carpal tunnel syndrome even if respondent's fall and hand use at Todd merely aggravated a preexisting condition. Pet. App. A11. The ALJ further found that, even after the surgery to relieve her carpal tunnel syndrome, respondent continued to have a "bilateral permanent partial hand disability based on chronic tendonitis and arthritis aggravated by the on-the-job hand use" at Todd. *Ibid.*

With respect to the average weekly wage, the ALJ explained that "[t]he best evidence of [respondent's] average weekly wage before me is the stipulated $519.29 yielding a compensation rate of $342.73 per week. It reflects the parties[']] best estimation of [respondent's] * * * most recent [wage] earning ca-

[3] The ALJ found no ratable disability attributable to the back strain (Pet. App. A13), a finding that was not appealed.

pacity before said capacity was impaired by the condition of [her] hands." Pet. App. A15. Accordingly, for purposes of computing benefits, the ALJ adopted the sum that the parties had stipulated to be respondent's average weekly wage as of August 11, 1980. Pet. App. A2.

3. The Benefits Review Board affirmed all the ALJ's findings except the amount of the average weekly wage. Pet. App. B1-B5. On that point, the Board held that "the proper weekly wage upon which claimant's award should be based" was her stipulated average weekly wage "at the time of her hand injuries, *i.e.*, December 9, 1979," rather than the stipulated wage at the time of her alleged back injury, *i.e.*, August 11, 1980. Pet. App. B6.

4. The court of appeals reversed the order of the Board and reinstated the ALJ's determination of the appropriate average weekly wage. Pet. App. C1-C9. It viewed the "novel" issue in this case as "whether the victim of a traumatic accident should be compensated at the average weekly wage rate as of the time of the accident, or as of the subsequent time when the disability attributable to the injury became manifest." Pet. App. C3-C4. Under Section 10 of the LHWCA, 33 U.S.C. 910, the injured employee's average weekly wage "at the time of the injury" determines his or her compensation rate. Pet. App. C5. Relying on several earlier LHWCA decisions applying a "manifestation rule" to discern the time of injury under Section 10 and other provisions of the Act, the court held that the time of disability rather than the time of a traumatic accident is the "time of injury" within the meaning of Section 10. Pet. App. C5-C8. Assuming that respondent's injury was due to the delayed, disabling effects of the 1979 fall (Pet. App. C5), it thus upheld the ALJ's use of the

1983 onset date of permanent total disability as the time of injury in this case.

Among the decisions relied on by the court in reaching that conclusion (Pet. App. C5-C6) was *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). In *Black*, the Ninth Circuit held that the time of manifestation rather than the time of exposure is the "time of injury" under Section 10 in a case of long-latency occupational disease such as asbestosis. While noting that Congress had codified *Black* in the 1984 amendments to the LHWCA by deeming the "time of injury" in occupational disease cases to be "the date on which the employee * * * becomes aware * * * of the relationship between the employment, the disease, and the * * * disability" (33 U.S.C. 910(i)), the court rejected Todd's argument that the reasoning of *Black* should be limited to occupational disease claims and not extended to traumatic injuries with delayed effects. Pet. App. C6. As the court explained (*ibid.*), although *Black* involved an occupational disease, "both its rationale and dicta indicate that its holding should apply to the manifestation of latent and unknown injuries as well."

The court also relied (Pet. App. C7-C8) on *Stancil* v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970), which applied the same manifestation rule to determine the time of injury for purposes of the then-current version of the LHWCA's statute of limitations provision, 33 U.S.C. 913(a). Cf. note 5, *infra*. As the D.C. Circuit had observed in *Stancil*, an "accident" is the event causing the harm, while an "injury" refers to "the harmful physical * * * consequences of that event which need not occur or become obvious simultaneously with the event." Pet. App. C7-C8

(quoting 436 F.2d at 276). The court below thus agreed with the D.C. Circuit that the term "injury" "encompass[es] physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed, such as an occupational disease or a latent wound." Pet. App. C8 (quoting 436 F.2d at 277). The court emphasized that this interpretation also serves the purpose of Section 10 by compensating workers for loss of future—rather than past—earning capacity, and by encouraging injured workers to attempt to return to work. Pet. App. C8.

The court did not accept petitioner's argument that the ALJ erred in finding that $519.29 was petitioner's average weekly wage when she became permanently disabled in 1983, although the court's opinion did not address that issue specifically. See Pet. App. C8-C9 ("[W]e conclude that the Board should have approved the Administrative Law Judge's decision applying the time of the disability rather than the time of the accident to measure the amount of compensation.").

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. While the decision below appears to be in some tension with *Director, OWCP (Morales)* v. *General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985), on the first question presented, neither the petitioners nor the court below recognized any conflict; *Morales* was

decided without any reference to the 1984 amendments to the LHWCA; and the two cases are distinguishable on their facts. Accordingly, further review is not warranted.

1. The LHWCA bases an injured employee's rate of compensation on the employee's average weekly wage "at the time of the injury."[4] 33 U.S.C. 910. In 1984, Congress amended the LWHCA by specifying that, for purposes of calculating the average weekly wage in claims "due to an occupational disease which does not immediately result in death or disability," the "time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." Act of Sept. 28, 1984, Pub. L. No. 98-426, § 10(a)(2), 98 Stat. 1647, codified at 33 U.S.C. 910(i). Congress expressly made this amendment applicable to claims pending on the date of enactment, September 28, 1984. § 28(a), 33 U.S.C. 901 note. The Act, however, does not further identify the "time of injury" in cases other than those involving an occupational disease within the meaning of Section 10(i).

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[4] Compensation is due for any "disability" (33 U.S.C. 908), which is defined to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

a. Although the court below did not specifically hold that the 1984 amendment controls this case, petitioner's condition is an "occupational disease" within the meaning of Section 10(i) and consequently falls within Section 10(i)'s manifestation rule. Petitioners assume (Pet. 6-8) that the amendment's reference to "occupational diseases" is limited to diseases caused by exposure to harmful substances or working conditions and does not include traumatic accidents. That assumption is incorrect: the provision speaks more broadly of "an occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i).

As the LHWCA's definition of "injury" makes clear, an "occupational disease which does not immediately result in death or disability" includes a degenerative condition that results from an accidental injury, like respondent's arthritis and tendonitis here. Section 2(2) of the LHWCA, 33 U.S.C. 902(2), broadly defines the term "injury" to include "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." 33 U.S.C. 902(2). That definition encompasses three different types of conditions. The first condition is an accidental injury whose effects are immediate, such as a severed limb or a burn ("accidental injury or death arising out of and in the course of employment"). The second is an accidental injury whose full effects are delayed, such as a fall or a blow followed by later degeneration of the affected body part ("such occupational disease or infection * * * as naturally or unavoidably results from such accidental injury"). The third condition

is an occupational disease caused by repeated exposure to harmful stimuli over time, such as asbestosis ("such occupational disease or infection as arises naturally out of such employment"). Notably, both the second and third conditions are denominated "occupational diseases." Because respondent's arthritis and tendonitis fall squarely within the second category—"occupational disease[s]" that result from accidental injuries—respondent's condition is an "occupational disease" that comes within the manifestation rule of the 1984 amendment.

The legislative history of the 1984 amendment reveals Congress's broad intent that "when compensation based on an occupational disease is awarded, the compensation benefits should be in an amount which is reasonable to the needs of the victim." H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 12 (1983). The House Committee proposed a rule basing the "time of injury" in occupational disease cases on "the time of onset of the disabling condition." *Ibid.* In conference, the language was modified to define the "time of injury" as the time of awareness of the relationship between the employment, the disease, and the death or disability. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 29 (1984); 33 U.S.C. 910(i). The conference report also specifically rejects the "date of last exposure to the injurious substance as the time of injury for determination of pay purposes." H.R. Rep. No. 1027, *supra*, at 29-30. Thus Congress plainly intended to set compensation levels in occupational disease cases at a dollar level commensurate to the employee's wage loss at the time disability becomes manifest. Nothing in the legislative history of Section 10(i) limits its applicability to those occupational diseases that arise naturally out of employment, but not out of accidental injury.

b. As an independent ground for application of Section 10(i), the facts of this case indicate that part of respondent's disability was due to a naturally occurring occupational disease—the third category of "injury" covered by the Act. As previously described, the ALJ found that respondent's hand condition was attributable *both* to the 1979 fall *and* to repeated hand use on the job (Pet. App. A11), and the court of appeals ascribed her injury to "the continued strain on her previous hand impairment" after the 1979 accident. Pet. App. C8. If the court had characterized respondent's hand condition as a "pure" occupational disease (carpal tunnel syndrome, arthritis, and tendonitis) caused only by her on-the-job hand use (repetitive motion trauma), the date of manifestation would plainly control under Section 10(i). There is no reason to define the "time of injury" differently here, where the disability resulted from *both* a traumatic injury with delayed effects *and* a chronic occupational disease caused or aggravated by repetitive hand use.

c. Even if respondent's condition did not come within the 1984 amendment's manifestation rule, nothing in that amendment or its legislative history reveals an intent to preclude application of a manifestation rule for conditions not encompassed within the terms of Section 10(i). The court of appeals therefore properly determined that respondent's injury—an accidental injury with delayed degenerative effects—should be treated in the same way that the Ninth Circuit had previously treated occupational diseases resulting from exposure to harmful substances or working conditions.

In *Black*, an asbestosis case, the court had held that the "time of injury" under the pre-amendment Section 10 of the Act was the time when the disability caused by the disease manifests itself. Although the

Black decision notes that "[i]n most cases of traumatic injury, the time of injury will coincide almost exactly with the time the worker is disabled" (717 F.2d at 1288), the decision also "foreshadows the problem that would arise in exceptional cases, like the one at bar, where the onset of disability occurs years after" a traumatic injury. Pet. App. C6. The result here, as in *Black*, compensates the injured worker based on the actual loss of income suffered at the time the worker becomes disabled. See also *Stancil* v. *Massey*, 436 F.2d at 276-278.[5]

d. In *Morales* v. *General Dynamics Corp.*, *supra*, decided soon after the 1984 amendments were enacted, the Second Circuit rejected a manifestation rule under Section 10 in a case where a traumatic injury led to degenerative post-traumatic arthritis several years later. Neither petitioners nor the court below identified *Morales* as inconsistent with the decision below, and indeed, *Morales* did not consider either the applicability or the remedial intent of the

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[5] The court of appeals also relied (Pet. App. C7) on several post-1972 cases concerning the interpretation of Section 13(a) of the LHWCA, 33 U.S.C. 913(a), the statute of limitations provision. See *J.M. Martinac Shipbuilding* v. *Director, OWCP*, 900 F.2d 180, 182 (9th Cir. 1990); *Marathon Oil Co.* v. *Lunsford*, 733 F.2d 1139, 1140 (5th Cir. 1984); *Todd Shipyards Corp.* v. *Allan*, 666 F.2d 399, 400-402 (9th Cir.), cert. denied, 459 U.S. 1034 (1982). In 1972, Congress had amended that provision to specify that "[t]he time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." In light of the amendment, which specifically employs a manifestation rule, the post-1972 cases do not appear to be on point.

1984 amendments.[6] It therefore cannot be concluded that, with the benefit of full consideration of the 1984 amendments, the *Morales* court would have disagreed with the conclusion reached by the Ninth Circuit in this case.

Morales also differs from this case because the *Morales* court found no evidence that the claimant's work continued to aggravate his knee condition after his original traumatic injury; the Second Circuit acknowledged that "[i]t has now been generally established that, where the increased risks of a particular employment aggravate a preexisting physical condition, the resultant disability may be treated as an occupational disease." 769 F.2d at 68. The Ninth Circuit's conclusion (Pet. App. C8) that in this case there *was* continuing work-related aggravation suggests that the Second Circuit would have agreed with the Ninth Circuit on the facts here.

For these reasons, any tension between *Morales* and the decision below does not warrant this Court's review.

2. Petitioners also argue (Pet. 8-9) that the ALJ's decision, upheld by the court of appeals, lacks any factual support and fails to explain its determination of respondent's average weekly wage, as required by the Administrative Procedure Act, 5 U.S.C. 557(c). Because the stipulations in the record concerned respondent's wages in 1979 and 1980, petitioners assert that they "could not provide a factual basis for determining [her] average weekly wage as of May

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[6] This failure is evidenced both by the lack of any explicit reference to the 1984 amendments, and by the court's assertion that "awareness" was "a factor introduced by Congress solely to extend the limitation period for the filing of claims." 769 F.2d at 68. That assertion was no longer true after Section 10(i) was added to the Act in 1984. See 33 U.S.C. 910(i).

19, 1983," which should have been based on earnings during the previous calendar year.

Petitioners' arguments are unpersuasive. Under the LHWCA, average weekly wages are to be calculated by one of three alternative methods, 33 U.S.C. 910(a), (b), and (c). The first two methods specifically refer to wages during the year immediately preceding the injury. Subsection (c), on the other hand, gives the factfinder more leeway to estimate the annual earning capacity of the injured employee in situations where subsections (a) and (b) cannot be applied.[7] It is used, for instance, when the employee's work is "inherently intermittent or discontinuous," or "when there is insufficient evidence with which to properly apply §§ 910(a) or (b)." *Walker* v. *WMATA*, 793 F.2d 319, 322 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); accord *National Steel & Shipbuilding Co.* v. *Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979).

In this case, the parties apparently introduced no evidence as to the wages either of respondent or of similarly situated employees during the year preceding May 19, 1983. Since there was thus no evi-

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[7] Subsection (c) provides (emphasis added):

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, *shall reasonably represent the annual earning capacity of the injured employee.*

dentiary basis for applying subsection (a) or (b), the ALJ relied on the best and most recent wage data in the record, as he is permitted to do under subsection (c). He also explained exactly what he had done, describing the stipulated average weekly wage of $519.29 as the "best evidence" before him, which reflected the parties' "best estimation" of respondent's most recent wage earning capacity before that capacity was impaired by her hand condition. Pet. App. A15. Although a more complete record might have permitted the ALJ to use a more recent or more accurate wage figure, any oversight by the parties or the ALJ in that regard does not warrant further review by this Court.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] We also note that the modification procedure in Section 22 of the Act, 33 U.S.C. 922, remains available to petitioners to correct any mistake in a determination of fact regarding respondent's average weekly wage. See generally *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

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